EXTRACT FROM BY-LAWS.

Section 9. No book shall, at any time, be taken from the Library Room to any other place than to some court room of a Court of Record, State or Federal, in the City of San Francisco, or to the Chambers of a Judge of such Court of Record, and then only upon the accountable receipt of some person entitled to the use of the Library. Every such book so taken from the Library, shall be returned on the same day, and in default of such return the party taking the same shall be suspended from all use and privileges of the Library until the return of the book or full compensation is made therefor to the satisfaction of the Trustees.

Sec. 11. No books shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured. A party violating this provision, shall be liable to pay a sum not exceeding the value of the book, or to replace the volume by a new one, at the discretion of the Trustees or Executive Committee, and shall be liable to be suspended from all use of the Library till any order of the Trustees or Executive Committee in the premises shall be fully complied with to the satisfaction of such Trustees or Executive Committee.

No. 1584.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

California Development Company,
Appellant,

vs.

New Liverpool Salt Company,
Appellee.

BRIEF ON BEHALF OF APPELLANT.

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BRIEF ON BEHALF OF APPELLANT.

STATEMENT OF THE CASE.

This suit was originally brought in the Superior Court of the state of California, in and for the county of Riverside.

The suit grew out of the following facts:

The plaintiff was the owner of certain lands described in the complaint, and of a plant for the manufacture of

salt, consisting of many buildings of different kinds, and machinery and various appliances, including a short line of railroad, or spur track, and which is situated at the northern end of what is known as the Salton Sink, at that time situated in the county of Riverside.

The waters of the Colorado river, and doubtless waters from other sources had, in the latter part of 1904, begun to form in the Salton Sink, and what is now known as the Salton lake or sea, and continued to rise until it finally overwhelmed the New Liverpool Salt Company's property, destroyed the buildings and machinery, and a large amount of salt which had been gathered.

At the time the suit was brought, the destruction was not complete, but the waters continued to rise during the whole of the years 1905 and 1906, and eventually submerged and destroyed the entire plant.

When the suit was originally brought, it, of course, sought to recover the damage to the plaintiff's property which had accrued up to that time. The California Development Company had constructed a canal connecting with the Colorado river on the west bank thereof, and by means of which canal the waters of the Colorado river were conducted into the Imperial Valley, and there distributed to the settlers of the valley for use for various purposes, mainly for irrigation.

The waters from the Colorado river did overflow into this canal and cut and enlarge the canal until finally nearly the whole of the Colorado river was flowing into the Salton Sink through the canal and other channels.

The claim on the part of the plaintiff was that this

overflow into the Salton Sink and the consequent destruction of the appellee's property was due to the negligence of the defendant, the California Development Company.

The action was brought to recover the damage to the plaintiff's property, and for an injunction restraining the continuance of the flow of the water from the Colorado river over the plaintiff's lands.

The complaint was molded after the ordinary forms of a suit in the Superior Court of the state of California, and under the provisions of its law as construed by the courts, legal and equitable actions might be joined, and in this case they were; the only equitable feature in the suit, being a suit for an injunction against the continuance of the alleged wrongs.

See original complaint, Tr. pp. 7 to 16.

The cause was removed to the United States Circuit Court, Ninth Circuit, for the Southern District of California, Southern Division, and after the cause was thus removed, the New Liverpool Salt Company, construing its complaint as we have above stated it, made its election to bring the suit on the equity side of the Circuit Court, and the bill was so framed.

And in the bill filed in this court, it alleged its ownership of the lands.

Tr. Vol. 1, p. 62.

That it was engaged in the business of mining, gathering and refining salt, and was the owner of, and operated a mill, drying sheds and warehouses at the northeast quarter of section 14 therein described; that the

buildings were between 700 and 800 feet in length, and equipped with engines, boilers and all the machinery necessary for reducing and refining salt, and that the buildings and equipment were of a value of more than $50,000; that it carried on a large and extensive business, and sold many thousands of tons of salt each year; that sections 15 and 23 described in the said bill were of great value, because they had upon them large deposits of salt.

Tr. Vol. 1, p. 63.

It next describes the Colorado river, and alleges that no part of the waters of the river would naturally flow upon or near the lands of the complainant.

Tr. Vol. 1, p. 63.

Then alleges that for more than a year last past the defendant, the California Development Company, had been carrying on the business of diverting the waters of the Colorado river, and carrying the same to *Calexico,* in the state of California, and distributing the said water by means of various canals, and disposing of the same for the purposes of irrigation. That it had constructed three intakes on the Colorado river for the purpose of diverting the waters and describes the manner in which they are conducted.

Tr. Vol. 1, p. 63.

That the lands of the complainant in the Salton Sink are about 280 feet below the sea level, and that by reason of the contour of the land, and the slope thereof from all points to which the water is carried by the said canal,

all water carried by the canal to such point except such as is used, absorbed and evaporated, finds its way through the various waste and distributing canals, etc., to Salton Sink and to the lands of the complainant.

Tr. Vol. 1, p. 64.

It then alleges that for more than six months the defendant had been carrying a large amount of water, the quantity being such that a flow of between 300 and 500 cubic feet per second passed through the canal in excess of the amount absorbed, evaporated or used for irrigation or other purposes, and that such an amount of water had been, for more than three months past, continually wasting from the canal system of the defendant, and pouring into the Salton Sink, and had produced a lake over 20 miles in length and several miles in width, and overflowed and covered all of section 23, a large part of section 15, and part of the northeast ¼ of the southwest ¼ of section 14, and that the flood had then reached within 200 feet of the buildings described, and would extend still further but for the fact that a dyke had been constructed by the company to prevent it.

Tr. Vol. 1, pp. 64 and 65.

That the water was continuing to increase, and if it was not checked, would, in a short time, overflow the dykes and flood the ground about the buildings, and endanger their safety by rendering the foundations insecure; that the complainant had many thousand tons of salt piled up on the ground inside of the dyke, which by such overflow would be destroyed and ruined; that the water carried sand and silt, which was being deposited

upon the lands covered by the salt, damaging it by covering up the salt deposits and rendering it impure, etc.

Tr. Vol. 1, page 65.

It alleged its ownership of a railroad, and gave a description of it, and alleged that that had been entirely covered by the overflow of waste water, and the deposit of sand and silt. That waste water in large quantities was still running into the lake, and increasing the size thereof; that the climatic conditions at Salton and in the vicinity of the lake and the property of the complainant was such that if the flow of the water was stopped and the defendant not permitted to divert the waters of the Colorado river into the said lake, the same would evaporate and disappear, but if not stopped, the plaintiff would suffer great and irreparable injury by the destruction of its business, and would suffer damages in a sum exceeding $200,000.

Tr. Vol. 1, page 66.

It then imputed all this overflow to the diversion by the defendant of the waters of the Colorado river in excess of the amount required for any useful purpose, and that a continuance of the overflow and flood would result from the continued diversion.

Tr. Vol. 1, page 67.

That the defendant, the California Development Company, had made no provision at the said intakes for the regulation and control of the flow of the waters, and that unless restrained by the court, the defendant would continue to divert the waters in large quantities, and they would naturally overflow the lands of the complain-

ant, and thereby destroy the property and business of the complainant, and occasion complainant great and irreparable injury.

Tr. Vol. 1, page 67.

The complainant then alleged that the railroad switches, rolling stock and their appurtenances, of the railroad had been damaged in the sum of $50,000 by the overflow; that just previous to the flooding of the lands, about 15,000 tons of salt were gathered and ready to be gathered, and which were overflowed and destroyed by the flood, and the complainant had been damaged in the sum of $25,000. That the lands and the salt deposits had, by reason of the floods, been damaged in the sum of $50,000; that the complainant had expended in constructing the dyke to protect its property, and in otherwise protecting it from the flood, $6,000; that the buildings, sheds, mill and machinery of complainant had been damaged by reason of the floods, in the sum of $25,000; that the business had been interrupted, and would be interrupted for a long period of time, and that complainant had thereby been damaged in the sum of $25,000.

Tr. Vol. 1, pages 68 and 69.

Supplemental bills were filed subsequent thereto as the waters increased and the damage became greater, but they simply alleged that the continuance and increase in the amount of the flood caused by said acts had further damaged the lands and salt deposits belonging to the complainant in additional amounts, in one of them the increased damage being in the sum of $180,000 in addition to the amount alleged in paragraph XV of the

complainant's bill, and that by reason of the continuance and increase of the flood caused by defendant's acts, the buildings, sheds, mill and machinery of the complainant's mentioned in paragraph XVII of the bill of complaint herein had been utterly destroyed, and complainant had been thereby damaged in the sum of $30,000 in addition to the amount therein alleged.

Tr. Vol. 1, pages 79 and 80.

This was the last of the supplemental bills, and filed after the entire property of complainant had been annihilated.

After this statement of the damages, the bill then alleges that these acts, doings and threats are contrary to equity and good conscience, and tend to the manifest wrong and injury of your orator in the premises; and forasmuch as your orator can have no adequate relief except in this court, and to the end, therefore, that the defendant may, if it can, show why your orator shall not have the relief hereby prayed, your orator prays that the defendant be required to make a full disclosure of all the matters aforesaid and according to the best and utmost of its knowledge, remembrance, information and belief, full, true, direct and perfect answer make to the matters hereinbefore stated and charged, but not under oath, etc.

Tr. Vol. 1, pages 69-72, and 80.

Then, after praying for a writ of injunction, both interlocutory and final, and to enjoin the defendant from diverting the waters of the Colorado river in any way whatever unless it should provide suitable headgates and headworks, and control the water so that it should not

flow in excess of the amounts which should be used for irrigation, etc., and that there should be no waste water, the fourth paragraph of the prayer is as follows:

"And that the defendant may be decreed to account for and pay over to your orator the damage occasioned complainant by the violation of your orator's rights; and that your Honors, pending the rendering of the decree above prayed, assess or cause to be assessed, the damages your orator has sustained by reason of the violation of its rights as hereinabove set forth."

Tr. Vol. 1, page 74.

To the bill filed in this court the defendant demurred, upon the ground that it appeared upon the face of the bill that the defendant was not entitled to the relief prayed for.

2. That the bill was multifarious, and because it united two different suits, one for legal, and the other for equitable, relief, and that the same could not be united in this court.

3. That the causes set forth in the bill were not within the jurisdiction of the court sitting as a court of equity.

Tr. Vol. 1, pages 73 *et seq.*

Demurrer to amended bill, and supplemental bill.

Tr. Vol. 1, pages 81 *et seq.*

The demurrer was overruled. The defendant answered the bill, and subsequently thereto filed an amended answer to the bill and supplemental bill, and upon the bill and supplemental bill, and the amended and supplemental answer, the cause was heard.

The answer denies the plaintiff's alleged ownership of the lands described in the bill.

Tr. Vol. 1, pages 87 and 88.

Denies that the complainant was, at the time of filing the bill, engaged in the business of mining, gathering or refining salt, or was the owner of, or operated a mill, drying shed or warehouse on the northeast ¼ of section 14; denied the plaintiff's ownership of the land, buildings, engine, boilers, etc., and denied that the buildings or the equipment were of the value of more than $50,000, or any value, or that the complainant carried on the business as alleged in the complaint.

Tr. page 88.

These denials were for the want of information or belief. The defendant denied also that no part of the waters of the Colorado river mentioned in paragraph IV of the bill of complaint flowed naturally upon or near the lands claimed by the plaintiff.

Tr. page 89.

Denied that the defendant had constructed, upon the Colorado river, three intakes for the purpose of diverting the waters of the Colorado river into the canals mentioned, and denied that at the time of the filing of the said bill, or at any time, the defendant was diverting any of the waters of the Colorado river; denied that any of the waters diverted by the defendant from the Colorado river was carried by the defendant, or allowed by the defendant, to flow to various points, from which points it passed into the New river or Alamo river, or into any waste or distributing canals; and then alleged that the

waters referred to were diverted from the Colorado river in Mexico, by a corporation organized under the laws of the Republic of Mexico, known as La Sociedad de Yrrigacion y Terrenos de la Baja California (Sociedad Anonima), which corporation was the owner of all the canals leading from the Colorado river in Mexico to the town of Calexico in California, mentioned in the bill of complaint, and denied that during any of the times mentioned in the bill, the defendant was diverting any water from the Colorado river which was allowed to flow into either the Alamo or New river, or upon any of the lands described in the bill of complaint.

Tr. pages 89 and 90.

Admitted that the complainant's land was below the level of the sea, and in what is known as the Salton Sink, and that water flowing into the New river or Alamo river naturally finds its way to the Salton Sink unless diverted from the said rivers, but denied that the water flowed upon the lands belonging to the complainant.

Denied that the defendant diverted, or was diverting, any amount of water from the Colorado river into any canal in such manner or quantity that a flow of between 300 and 500 cubic feet per second, or any amount, passed through the canals in excess of the amount absorbed or evaporated or used for irrigation and other purposes, or that streams of water amounting all together to between 300 and 500 cubic feet per second, or any amount, for more than three months prior to filing the bill, or at any time subsequent, had been continually wasting from

the canal system, or pouring into the Salton Sink, or had produced a lake of any size whatever, or had overflowed or covered all or any part of section 23, or of section 15, or of section 14, described in the complaint, or that the said flood waters or lake, at the time of filing said bill, had reached within 200 feet of the buildings in the bill described, or that the waters would have extended further but for the dyke alleged to have been constructed by the complainant.

Tr. pages 90 and 91.

Denied that at the time of the filing of the bill the plaintiff's buildings were in danger, or that at that time the complainant had any salt piled up on the ground inside of the dyke and which might thereafter be overflowed or destroyed or ruined, or that the waters being carried into the lake deposited silt, mud or sand upon the lands covered by the overflow, or that such deposit had, at the time of the filing of the bill, damaged the lands described therein by covering up the salt deposited thereon, or by rendering the same impure or more difficult to mine or refine, or that such damage was constantly or at all being increased by the washing in by the wasteway sand, silt and mud.

Tr. pages 91 and 92.

Denied the plaintiff's ownership of the railroad, and use thereof for the purpose of carrying rough salt from the mines to the mill for the purpose of reducing or refining the same, or that it was used for any purpose.

Tr. page 92.

Admitted that waste water, at the time of the filing of the bill, was still running into the lake and increasing its size, but denied that all or any of the property of the complainant in said bill described would be covered by water, or its business destroyed.

Tr. pages 92 and 93.

Denied that there were no streams of water which naturally run upon the lands described in the bill, in sufficient quantity to cover or flood said land with water, but on the contrary alleged that the flood waters going down the Alamo and New rivers in times of flood such as existed in the years 1904 and 1905, and particularly during the winter season of 1905, and the waters flowing from the natural drainages from the mountains and surrounding locality in said Salton Sink, will flow upon the lands in the bill described, and that the natural flow of said waters, if allowed to take their natural course, would have flowed upon the lands in the complaint described, and that the Salton Sink, without any water being carried therein artificially, during the said year 1905, would have become a great lake, and overflowed the lands and property in the bill described, and that if the canals mentioned in the bill of complaint had not been constructed or built, and the waters of the Colorado river coming down had been allowed to take their natural course, they would have overflowed the banks of the said river, and would have flowed into the channels leading therefrom, and found their way through said channels and over the surrounding country through the sloughs and bayous into the said Salton and Alamo rivers, and would have gone into the Salton Sink and to

and upon and over the lands in the bill of complaint described; and that if the canals referred to had not been constructed, all of the lands described in plaintiff's bill of complaint would have been overflowed by the waters coming down the said Colorado river and finding their way and flowing naturally into the New and Alamo rivers.

Tr. pages 93 and 94.

Denied that the conditions at Salton and in the vicinity of the lake, and the property of the plaintiff, are such that if the flow of the waste waters in the said lake be stopped, and the defendant be not permitted to divert the waters of the Colorado river into said lake, the same would evaporate and disappear, but alleges that the defendant is not, and at no times mentioned in the bill of complaint was, diverting any waters of the Colorado river into the said lake.

And for want of sufficient information or belief to enable it to answer certain allegations in paragraph X of the bill, denied that if the flow of the waste water be not stopped, the complainant would suffer great or irreparable injury by the destruction of all of its property or business, or would suffer damages in a sum exceeding $200,000, or any sum.

Tr. pages 94 and 95.

Denied that all or any of the flooding of the lands of complainant was caused by or was the result of the diversion by the defendant, from the Colorado river, of the stream of water mentioned in the bill, in excess of the amount required for any useful purpose, or that it

was caused by, or was the result of the diversion by the defendant of any waters from the Colorado river whatsoever; or that any overflow or flood would or did result from the continued or any diversion by the defendant of the waters of the river which naturally flowed, or would flow, in another direction.

Tr. page 95.

Denied that the intakes mentioned in paragraph XII of the bill were constructed by the defendant. Denied that unless the defendant constructed head gates for the controlling and regulating of the amount of water flowing in its canal, there would continue to flow through said canal an amount greatly or at all in excess of that required for proper use, which would flow in any lake or upon the lands of the complainant, or destroy or ruin the property or business of the complainant, and denied that unless defendant was restrained by this court, it would continue to divert from the Colorado river large or any quantities of water which would naturally flow in another direction, in such manner that the same would overflow and flood the lands of complainant, or destroy its property, and denied that complainant had no adequate remedy at law.

Tr. pages 95 and 96.

The defendant then, in its answer, denied specifically the damages alleged to have been suffered by the plaintiff. Denied that the railroad had been damaged in the sum of $50,000. Denied that the plaintiff had about 15,000 tons of salt just previous to the flooding, or any salt, gathered or ready to be gathered, which was over-

flowed and destroyed by the flood. Denied that the complainant was, by such destruction of the salt, damaged in the sum of $25,000, or any sum, or that the lands and salt deposits had been, by reason of the deposit of silt or mud by the flood, damaged in the sum of $50,000, or any sum; or that complainant had expended in constructing a dyke for the protection of its property, or moving the salt, or otherwise protecting its property, the sum of $6,000, or any sum, or that the buildings, sheds, mills and machinery of complainant, or all together, had been damaged by reason of the floods, in the sum of $25,000 or any sum, or that the complainant had been engaged in carrying on the business at a profit, or had, by reason of the flood, been interrupted in its business, or would be interrupted, or that complainant was damaged thereby in the sum of $25,000, or any sum.

Tr. pages 96 and 97.

And then, as this amended answer was filed after the first supplemental bill was filed, denied that the complainant had, since the commencement of the action, or by reason of any acts of the defendant, been damaged in any sum whatever.

And denied that the continuance and increase in the amount of the flood had damaged the lands or salt deposits, belonging to the complainant in the sum of $180,000 in addition to the amount alleged in paragraph XV of the complainant's bill, or in any sum whatever, or that by reason of the continuance or increase of the said flood, the buildings, sheds, mill and machinery of the complainant, mentioned in paragraph XVII of the said

bill, had been utterly destroyed, or that complainant had thereby been damaged in the sum of $30,000 in addition to the amount alleged in paragraph XVII of complainant's bill, or any sum. And denied that any part of the flood was caused by the defendant or by any of its acts, and denied that any of the injuries or damages complained of in said bill of complaint were caused by this defendant.

Tr. pages 97 and 98.

A separate answer to the bill was then set forth, and which in substance, is that a certain tract of land in San Diego county in the state of California, known as the Imperial Valley, and which contains more than 400,000 acres of land susceptible of irrigation by the waters of the Colorado river, was, in the year 1896, public land belonging to the United States, and of a dry and sandy character, with little vegetation thereon, and in that condition practically desert lands; but that with water for proper irrigation, they were capable of being rendered fertile and valuable.

Tr. Vol. 1, pages 102 *et seq.*, particularly commencing at page 114.

That in 1896 the defendant corporation, the California Development Company, was incorporated under the laws of the state of New Jersey for the purpose of obtaining the water from the Colorado river, to be supplied to the Imperial Valley, together with a large amount of land in the Republic of Mexico, lying immediately south of the boundary between California and the said republic.

Tr. Vol. 1, page 114.

That the defendant, through an arrangement with a Mexican corporation, undertook to divert the waters of the Colorado river at a point on American soil, and a short distance above the boundary between the United States and Mexico, on the west bank of the Colorado, and by means of a canal to be constructed to conduct the waters of the river through the said tract of land in Mexico, and to the boundary line between the United States and Mexico, with a view to furnishing water for irrigation to the lands referred to in both republics.

Tr. pages 114 and 115.

In pursuance of this arrangement the defendant did, construct a canal, beginning the construction in the year 1900, and constructed it down to and across the lands in the Republic of Mexico, and to the boundary westerly from the Colorado river. That the said canal was constructed openly, and notoriously, and at a large expense; that divers water companies were organized under the laws of the state of California, known as Imperial Water Companies Nos. 1 to 8 respectively, which were organized for the purpose of taking the waters from the said canals and furnishing the same to settlers upon said lands in the county of San Diego, state of California, for irrigation and domestic uses, and contracts were entered into between the defendant and the said several Imperial Water Companies for furnishing to them the said waters, and in pursuance of such contracts, divers lateral canals were constructed by them, and through which the waters of the Colorado river so diverted by the said canal were

to be delivered and distributed to the settlers upon the said tracts for irrigation and domestic uses.

Tr. pages 115 and 116.

The several lateral canals and the main canals were completed, and a large amount of land of the Imperial Valley had been settled upon, and entered, under the laws of the United States, by divers persons who became purchasers of the stock of the said several Imperial Water Companies, which stock entitled them to water for irrigation and domestic uses.

That prior to the commencement of the suit, there had been more than 100,000 acres of the said lands in the said Imperial Valley brought under cultivation, and water had been furnished to the owners of said lands and settlers for irrigation and domestic uses, and that said lands have been proven to be of great value for agricultural and horticultural purposes when supplied with water for irrigation.

Tr. page 116.

That the defendant had been furnishing water to the said several Imperial Water Companies from the main canal connecting with the Colorado river, for two or three years prior to the year 1904, and in the course of the furnishing of water through the said canal at the point of connection with the Colorado river on the west bank thereof, and a few miles north of the international boundary, the said canal had at its head, and for a considerable distance from its head, become filled up with silt so that the canal at its head was incapable of carrying water sufficient to furnish the said owners and set-

tlers upon the said lands with water in quantities sufficient to insure the successful cultivation of said lands, and for that reason, in the year 1904, a second connection had been made with the river, known as the second intake to the said canal, and which intake was a few miles south of the first intake, and connected with the main canal at a point eight or ten miles distant from the Colorado river; and in the course of the use of that intake, which also had become silted, and both intakes had so far filled with silt that it became evident that a sufficient quantity of water could not be obtained in the said canal through the two intakes to furnish the said owners and settlers upon the said lands with sufficient waters for their purposes, and with the demonstration of the fertility of said land when supplied with water, new settlers were continually coming in, and other lands were being taken up and the area of cultivation extended, until it appeared that in the season of 1904 the cultivation would probably extend over an area of 200,000 acres, and to meet the demands of the then cultivated lands, and the prospective extended area of cultivation a third intake was constructed connecting with the Colorado river on the west bank, and connecting with the main canal at a point ten or twelve miles westerly from the Colorado river.

This was constructed because of the prospective demand for water during the season of 1904, and up to that time, the experience of the defendant with the canals and several intakes, had induced the belief that the action of the waters in the said several intakes, instead of washing and expanding the capacity of the in-

takes, tended to fill up the intakes, and to require dredging from time to time to keep the capacity thereof to a point sufficient to carry water in sufficient quantities to supply the people, and in the course of the said experience, it had become necessary at different times, to dredge out the upper ends of the canals and intakes for the purpose of obtaining water in sufficient quantity.

Tr. pages 116, 117 and 118.

In the meantime, and prior to the year 1904, there had sprung up in the Imperial Valley, towns that were to be supplied with water, and the inhabitants of the valley numbered more than 10,000 people who were dependent upon the waters obtained by means of the canals, for irrigation purposes and other uses, and in the construction of said canals, both the main canal and intakes, and the laterals, the defendant had provided for the use of water diverted thereby, and for taking care of the same, by wasting upon a broad expanse of territory, more than 25 miles south of the Salton Sink, in such way that under ordinary conditions, or any conditions which could have been foreseen, the said waters could have been, and would have been, so handled and distributed that no injury whatever would have occurred to the property of others. But in the year 1904 and 1905 the rains falling in that section of the country, and the mountains which constitute the water-shed surrounding the Imperial Valley were greatly in excess of anything that had occurred previously thereto within the knowledge of the people of the said sections. And by reason of these rains, the demand for water for irrigation was made much less than otherwise it would have been, and less than the demand

reasonably to be expected for the season of 1904 and 1905, for irrigation and domestic uses and supplying the said towns. And later in the years 1904 and 1905, and particularly in the winter and spring of 1904 and 1905, and summer of 1905, enormous floods occurred in the Colorado river, with greater frequency and longer continuance than had ever been known to occur in the said river, and in that section of the country before, and by reason of these several causes, mainly the overflow from the Colorado river during the winter of 1904 and 1905, and the summer of 1905, and continuing on down to the time when this answer was made, which was on the day of December, 1906, the main canal became washed out, and vast amounts of water poured from the Colorado river until finally nearly the entire river flowed into said canals, and such was the enormous quantity of flood waters that if there had been no canal there, the Salton Sink would have been filled with water to an extent quite as great as, if not greater than, has actually been experienced. As a matter of fact, the said canals, by embankments thrown up in the construction of them, had prevented a large amount of water from the Colorado river flowing into the Salton Sink by diverting it in other directions to the southward from the said canal.

Tr. pages 118 to 120.

The defendant then further alleged that in the construction of the main canals, of the three intakes, and the laterals, more than $250,000 had been expended prior to the commencement of this suit, and prior to the first of January, 1905; that a

large amount, not less than five million dollars, had been expended in the settlement and improvement of the said Imperial Valley, and that the value of the property dependent upon the said waters from the said canals for irrigation and domestic uses for the inhabitants thereof was of a value exceeding ten million dollars, and which property would be rendered worthless without the use of the waters from the Colorado river; and alleged that there is no other source from which the people of that section of the country can be supplied with water, either for domestic uses or irrigation of their lands. And they alleged that they are dependent upon the waters of the Colorado river, and also upon the canals of the defendant.

Tr. page 120.

It was alleged that since the floods began in the Imperial Valley, in the effort to protect the settlers of the valley and the works of the plaintiff, and the property in that district, from injury by the said floods, the defendant had expended, or caused to be expended, a large amount of money, to-wit, more than half a million dollars, and that it was still engaged in the expenditure of money to prevent the overflows from the said river, and that after the defendant had succeeded in closing the break made through the said canals, and turning the Colorado river back into its natural channel in the fall of 1906, another flood occurred in the Colorado river, overflowing the banks of the said river on the western side southerly from the lower of the said intakes, and again discharging enormous quantities of water, near-

ly the entire Colorado river, into the district of land south of the said canals, and from which a large portion thereof had entered the Salton Sink. And that the defendant had been engaged, and was still engaged, in the expenditure of large sums of money to exclude the flood waters and to confine the said river again within its natural channel. And it is alleged that it had not been, by any act or omission, or any negligence on the part of the defendant, that the said floods had filled the Salton Sink and made the Salton lake therein, but that the same had been caused by the enormous and frequent and long continued floods of the Colorado river, and that such floods could not have been foreseen and provided against.

Tr. pages 120 and 121.

Such were the issues made by the pleadings, and upon which the cause was heard.

But for a better understanding of the various questions which arose in this case, and are now here for determination, we think it proper to enter into a little further amplification of many of the main facts upon which this controversy depends. And we may say here, that as voluminous as this record is, no inconsiderable part of it consists of the description of conditions and the statement of former and existing facts, about which there is no controversy between the parties, and no conflict in the evidence.

The section of country through which this main canal runs, is a vast area of many hundreds of square miles. And as we approach the section known as Imperial Valley, there is a vast amount of lands which, with ir-

rigation, are susceptible of cultivation, and are exceedingly fertile and productive. This area, while described in the answer as about 400,000 acres, is in fact nearer a million. The 400,000 acres refer particularly to the tract of country which is known as Imperial Valley, and even as to that, it is understated.

This land is, in a great measure, in its natural state, practically a desert. The soil is of an exceedingly sandy character, capable of great absorption, and the climate itself one of the most arid in the United States, if not in the world.

Evaporation in that tract of country, under ordinary circumstances, is enormous, and the absorption of water flowing upon the surface of the ground is also great indeed. The Salton Sink at its lowest depth is about 280 feet below the level of the sea, and the Salton basin properly so-called, and as distinguished from the Imperial Valley and its irrigable lands, is barren of everything except that now it is covered with water.

The New Liverpool Salt Works were situated at the northwesterly end of this valley. The canals conducting the water from the west bank of the Colorado river approaches the Imperial Valley at its southeasterly end; the main canal from the Colorado river to the boundary line between the United States and Mexico is about 45 or 50 miles in length, and the canals by which the water is taken and conducted to the place of use, extend, at their furthest extremity, about 40 miles further north.

The New Liverpool Salt Works are situated about 45 miles from the extreme northern portion of the irrigable lands. The Imperial Valley is 25 or 30 miles in width.

The New Liverpool Salt Company's buildings at the northwest extremity of the lake are at an altitude of about 3 feet above the elevation of the lowest point in the Salton Sink, but it is about five miles distant from that lowest point, so that the difference in elevation over a distance of five miles is only about three feet, from which it will be seen that this Salton Basin is a shallow saucer, with an inclination or grade not perceptible to the eye, and measureable only by water levels. And while away from this Salton Sink proper, the inclination is greater, yet from the crest or sea level to the lowest depth of the lake, a distance probably of 75 or 80 miles, the difference in elevation is only about 280 feet. The land, therefore, has no very great grade at any place, at least not extending for any considerable distance.

The losses by evaporation and seepage of waters flowing from the natural surface of this land, and in a climate such as characterizes that country, is something enormous.

The Colorado river overflows every year. From the evidence in this case it will be seen that there has never one year rolled by without overflows from the Colorado river with the possible exception of the year 1888. Every other year the records show that the Colorado river has overflowed its banks on the western side, but never but once in the history of the country, or in its traditions has there been any Salton Sink formed except once, and that in the year 1891. At that time a lake was formed about

five feet in depth, and covering an area of about 120 or 130 square miles.

Testimony of George W. Durbrow, Tr. Vol. II, pp. 641 and 642.

Durbrow makes the area 360 sq. miles, but this is too great.

Furthermore, there are innumerable sloughs or points of overflow along the western bank of the Colorado river, and these floods have formed channels cutting through that country in various directions and to various points, and among them is the channel known as the Alamo river.

There is also a wash from these overflows which runs into a lake 20 or 30 miles further south, known as Volcano lake. This lake's discharge is from the southern end towards the Gulf of California until the water reaches a certain height in Volcano lake, when it spills out over to the north side, and this overflow from the northern end of Volcano lake has washed out another channel which is known as New river, and which runs northerly towards and into the Salton Sink. The Alamo wash is another which also has its trend towards and extends to the Salton Sink.

These and other channels, some of which will be noticed further along, have been made by the overflows of the Colorado river, and whose existence has been known many years prior to the construction of this canal, or the cutting of any of these intakes.

There was no canal connecting with the Colorado river when the flood of 1891 occurred and made this lake to which we have referred before.

The ordinary seasons of the overflow of the Colorado river is in the summertime, or rather, during the months of May, June, July and August.

At the Yuma bridge there is constructed a gauge which measures the height of the water of the Colorado river at that point, and which gauge plays an important part in the evidence in this suit, as it is agreed that some point on that gauge marks the point of the flow at the Yuma bridge at which the overflows take place in the vicinity of these intakes.

These events, the flood of 1891, the existence of these various washes, the annual floods had occurred and been observed and their effects been observed for more than 30 years before the California Development Company began its operations in that section, and when it did begin, there was this Mexican company organized, which owned the lands lying below the International boundary. With this Mexican company the California Development Company had a contract in regard to the construction of the canals, and to which we shall refer further along.

The three intakes referred to in the pleadings in this case all extend to, and connect with, this channel known as the Alamo river, and which, as we have said before, has existed from the time whereof the memory of man runneth not to the contrary. And when this Alamo watercourse is reached, which is at about twelve miles west from the Colorado river and about where the canals and these three intakes come together, they each and every of them discharge when water flowed therein into this Alamo wash, and the Alamo watercourse or wash

is the canal herein complained of for a distance of about 40 miles.

Returning now to the contracts. There were introduced in evidence certain contracts printed and contained within a red book which was marked "Defendant's Exhibit No. 34." And also contracts between the California Development Company and the various Imperial water companies, marked exhibits 35, 36 and 37.

In the red book, defendant's exhibit No. 34, there are, besides the articles of incorporation of Imperial Water Company No. 1, and its by-laws, certain contracts set forth, one of which bears date the 6th of April, 1900, between the Sociedad de Yrrigacion y Terrenos de la Baja California (Sociedad Anonima), (hereinafter called the Mexican company), and the Imperial Water Company No. 1; and the other dated the 24th day of July, 1901, between Imperial Water Company No. 1 and this Mexican company, and the California Development Company.

We call attention now, first, to the contract between the Mexican company and Imperial Water Company No. 1, and which is printed last in the book referred to.

It recites that, whereas, the first party (that is, the Mexican company), is about to construct a canal for the purpose of diverting certain waters of the Colorado river to be used for irrigation and other useful purposes, and is desirous of selling the right to use such water; and

Whereas, the second party is a corporation formed for the purpose of supplying water to its stockholders only upon certain lands situated in the county of San Diego * * * * * and within certain ex-

terior boundary lines mentioned and described in the articles of incorporation; and

Whereas, the second party is desirous of obtaining a supply of water for the use of its stockholders (then follows the agreement).

The Mexican company agreed to deliver to the Imperial Water Company, annually, four acre feet for each share of stock of the water company which may have been issued and located upon land situated within the boundaries of the lands to be supplied with water by the Imperial Water Company No. 1, provided that the aggregate which the Mexican company was obligated to deliver should not exceed 400,000 acre feet per annum.

The water was to be delivered at the point on the international boundary line between the United States and Mexico to be thereafter agreed upon.

And the Mexican company was to have no interest in, or control over, the water after delivery thereof at the international boundary line.

In consideration of this agreement upon the part of the Mexican company, the water company agreed that the Mexican company should have the exclusive right to sell the entire shares of capital stock of the said Imperial Water Company, and to retain all moneys received from such sales for its own use; the first 50,000 shares of stock sold should be at a price not exceeding $8.75 per share. (By the articles of incorporation of the Imperial company, it will be seen that its capital stock was a million dollars, divided into one hundred thousand shares of the par value of ten dollars each.)

It was further agreed that the second 50,000 shares

was to be sold at a price to be designated by the Imperial Water Company, but not less than $8.75 per share. All money received from the sale of the second 50,000 shares was to be paid to the Imperial Water Company. The first money received from the sale of the second 50,000 shares should be divided equally between the parties until the water company had received an amount equal to the amount for which said stock should have been sold in excess of $8.75 per share. The water company was to locate all stock upon the lands selected by the purchaser of the stock, or on the order of the Mexican company at the time of the sale, the stock, however, to be located within the exterior boundary lines of the lands to be irrigated by the Imperial Water Company No. 1.

The Imperial Water Company agreed to order and receive from the Mexican company one acre foot of water each year for each share of stock so sold and located; and agreed to pay to the Mexican company fifty cents for each acre foot delivered. The water company had the right to obtain from the Mexican company four acre feet per year for each share sold and located, but was bound to receive and pay for one acre foot for each share, the price of each acre foot to be fifty cents.

All water received by the water company prior to the 1st day of July of each year was to be paid for on the 1st day of July, and all other sums due for water each year should be paid on the 1st day of January of the following year.

The water company was to construct its own distributing system commencing the same at the point of delivery on the international boundary line, and the work

to be done at its own expense. The Mexican company had the right, at any time, to enlarge, at its own expense, any of the main canals of the Imperial Water Company No. 1, for the purpose of conveying water through the same to other lands, and that after such enlargement, the Imperial company should pay only its pro-rata of the expense of keeping the same in repair.

Such was the substance of this agreement.

The agreement of the 24th of July, 1901, between the Mexican company, the Imperial Water Company No. 1, and the California Development Company, referred to the contract of April 6, 1900, between the Imperial Water Company No. 1 and the Mexican company, and which agreement was annexed to the contract of July 24, 1901, marked exhibit A, and made a part thereof.

It then referred to a contract made on the 28th of December, 1900, whereby the California Development Company entered into an agreement with the Mexican company, in which the California Development Company agreed to deliver to the Mexican company a certain amount of water appropriated, owned and diverted, or to be in the future appropriated or diverted by the California Development Company, from the Colorado river, to enable the Mexican company to furnish water for irrigation of certain lands situated in Lower California, in the Republic of Mexico, and in the state of California, irrigable by gravity from a certain system of canals to be constructed by the C. D. company, by which agreement the Mexican company conveyed to the California Development Company its right to sell the entire capital stock of the Imperial Water Company No. 1.

This contract of December 28, 1900, is also annexed to the contract between the three parties, and marked exhibit B, and made a part of the contract of July 24, 1901.

This latter contract then recited that the California Development Company had sold a large amount of the capital stock of the Imperial Water Company, and had constructed a portion of the irrigation system contemplated in the contract exhibit B, and was then engaged in the further construction thereof.

Recited the fact that the waters conveyed to the Mexican company under the said contract exhibit B were the waters to be used by the Mexican company in supplying the Imperial Water Company with water under this agreement.

And after these recitals, and of the assessment of one dollar per share upon the stock of the Imperial Water Company No. 1, it was then agreed between the three parties that the contract of April 6, 1900, exhibit A, should be rescinded, but that the rescission was not in any way to affect any act which had been done by either of the parties thereto.

The Mexican company agreed, upon the demand of the water company, to perpetually deliver to it an amount of water not exceeding four acre feet of water per annum, for each outstanding share of stock of the Imperial Water Company, providing the aggregate was not to exceed 400,000 acre feet per annum.

It agreed to deliver the water to the Imperial Water Company No. 1 at the point upon the international boundary line where the main canal constructed by the Mexican company crosses the line, being a point distant about

2¼ miles easterly from monument No. 220 of said international line; and it was agreed that the Mexican company had no interest in, or control over, the said water after the delivery thereof at the said international boundary line.

The water company agreed that the California Development Company should retain all moneys or other property which might have been, or may be, received by it from the sale of the capital stock of the water company theretofore sold, and should have the exclusive right to sell all of the remainder of the capital stock except 2500 shares, upon such terms as it might desire, and receive for its sole use and benefit all moneys or other property that might be obtained therefor.

As to the 2500 shares of the capital stock of the Imperial Water Company No. 1, it should be retained by that company as treasury stock, and neither the Mexican company nor the California Development Company had any interest therein, or in the proceeds to be obtained from the sale thereof, and the stock so sold by the water company from time to time, as the second party might require, the proceeds of such sales to pay its running expenses, at the same price and upon the same terms that the California Development Company was selling its stock.

It was further agreed that the capital stock should be issued by its officers at such times and to such persons and in such amounts as the C. D. company should, from time to time, in writing request, until the entire capital stock of the second party should have been issued except as to the 2500 shares.

It was again agreed that the water company should receive and pay for, not less than one acre foot of water for each share of its stock outstanding upon the first day of July of each year, and pay to the Mexican company the sum of fifty cents per acre foot for each acre foot of water delivered, which was the price to be paid annually; and in no event and under no conditions was this price to be increased.

It was further agreed that the water received by the water company prior to the first of July, should be paid on that day, and all other sums on the first day of January following.

And it was provided that for a failure or default of the water company for a period of 90 days to make payments for water delivered after it became due, the Mexican company and the California Development Company, or either of them, might cease to deliver such water from the said main canal until such arrearage was fully paid.

The California Development Company agreed to construct and maintain a main canal, commencing at a point on the international boundary line where the water was to be delivered to the Imperial Water Company, and continuing from the point of commencement through the lands described in the articles of incorporation of Water Company No. 1, and to be of sufficient capacity, either in its original construction or through subsequent enlargements from time to time by the California Development Company at its own cost and expense, to convey an amount of water sufficient at all times for the irrigation of the lands owned or located by the stockholders of the water company, and of a capacity to carry at least four

acre feet of water per annum, for each outstanding share of stock of the water company.

The canal was to be owned and maintained by the California Development Company, which was to have the exclusive right to navigate the said canal, and to develop and use all power that might be developed from the waters flowing therein.

The California Development Company agreed to convey the water to be delivered by the Mexican company to the water company through said canal to the lateral ditches to be constructed by it as therein provided.

If the California Development Company failed to construct and maintain the canal system, and deliver the water to the lateral ditches to be constructed by the C. D. company, then the water company had the right to enter upon the canal and make such additions and repairs thereto, and changes therein, as were necessary in order that it should have a capacity sufficient for the conveyance of the water to be conveyed to it therein, and also had the right to convey the water through said canal from the international boundary line to the lateral ditches, and the cost of such additions and changes in said canal, and expense of conveying the water through the same would be a claim against the California Development Company.

The California Development Company further agreed to construct a system of distributing ditches, together with all necessary gates and water weirs for the water company, and in such manner as to convey the waters from said canal to a point upon each governmental subdivision of 160 acres of land from which it was practi-

cable to irrigate the same; with some further minor provisions not essential to the understanding of the relations between these different companies.

But each and all lateral ditches, as soon as completed by the California Development Company, were to be turned over to the water company, and thereafter owned, possessed and controlled and maintained by it.

The lateral ditches to be constructed where necessary to irrigate the lands owned or located by the stockholders, were to be either as originally constructed, or by subsequent enlargement, of ample size to convey to the stockholders of the Imperial Water Company No. 1, an amount of water equal to two-thirds of an acre foot per month for each share of stock owned by them, with provisions for refunding to a stockholder the moneys paid in case his land was so located that it could not be reached by gravity without going to too great an expense, and to take up the stock, which was to be assigned to the California Development Company.

To avoid the loss by seepage and evaporation, to the stockholder, it was agreed that the water should be measured, not at the international line, but at the point where the same was delivered from the main canal, so to be constructed by the California Development Company, into the main laterals of the water company, at which place the water company was to receive the full amount of water agreed to be furnished, and an additional two per cent.

The moneys collected from the assessment No. 1 were to be paid by the treasurer of the water company to the California Development Company, to be used by it in the

construction of these canals and laterals, or the California Development Company would, at the option of the stockholders, credit the stockholders with the amount of the assessment paid by them upon their obligation to the C. D. company last falling due, or issue receipts as thereinafter provided.

Provision was then made for issuing receipts.

By another provision, it was declared that the interest due from the stockholders of the water company to the California Development Company should not commence prior to January 1, 1902, and that no money would be collected from the water company for any water furnished prior to that time.

An acre foot of water was defined.

Passing now to exhibit B annexed to this contract, and which was between the California Development Company, the party of the first part, and the Mexican company, the party of the second part, it was recited that the party of the first part was the owner of a certain tract of land situated in the county of San Diego, (and which was particularly described), containing 318.51 acres, more or less, and that the C. D. company had appropriated and was the owner of a large amount of the waters of the Colorado river and engaged in the diversion of the water from that river upon the lands so owned by the California Development Company, and was engaged in the construction of headworks and a canal on said land for the purpose of diverting these waters, and in the construction of an irrigation system and system of canals whereby the waters of the Colorado river so diverted upon the said lands of the C. D. com-

pany described therein, might be used for the irrigation of lands in Lower California and in the state of California.

It was further recited that the Mexican company, the party of the second part, was the owner of a tract of land containing about 100,000 acres, situated in Lower California, a portion of which lay immediately south of the international boundary line, and the said boundary line was also a boundary line of the said tracts of land. That the system of canals so being constructed by the party of the first part crosses the said international line from a point upon the land owned by the California Development Company therein described, to a point on the lands owned by the Mexican company. That the proposed extension of said canals and irrigation system extends through and across the lands of the Mexican company in a generally southwesterly direction, and then in a generally northerly direction across the lands of the Mexican company, to various points upon the international boundary line, from which lands in California could be irrigated, and also extended to other points upon the land of the Mexican company from which its lands and other lands in Lower California might be irrigated.

Referred then to the contract between the Mexican company and the Imperial Water Company No. 1, of April 6, 1900, whereby the Mexican company had agreed to deliver to the Imperial Water Company No. 1, at a point on the international line, a certain amount of water;

That whereas the Mexican company contemplated en-

tering into additional contracts with other companies already formed or to be formed in the state of California, for the purpose of delivering to such water companies a large amount of water for the purpose of irrigating certain large tracts of land in California, and desired to obtain water for the purpose of complying with the contract entered into with Imperial Water Company No. 1, and to obtain water for the purpose of complying with the contracts proposed to be entered into with these other water companies, and also desired to obtain a supply of water for the purpose of irrigating the lands belonging to the Mexican company itself in the Republic of Mexico; and desired to obtain water for the purpose of furnishing waters for irrigation of other lands situated in Lower California.

Then recited the fact that under the contract already made, the Imperial Water Company No. 1 had granted to the Mexican company the right to sell all of its water stock, and that the Mexican company proposed to make similar contracts with other California corporations, then in consideration of the obligations imposed upon the Mexican company, the California Development Company, the party of the first part, agreed to build the system of canals from the point upon the lands of its own where the water was to be diverted from the Colorado river, to and across the international lines, and across the lands of the Mexican company in Lower California, to other points upon the international line from which large tracts of land situated in California could be irrigated; and also a system of canals from said point upon the Colorado river where the said water was to be di-

verted from which the lands of the Mexican company and other lands in Lower California could be irrigated.

The California Development Company agreed to perpetually deliver to the Mexican company a sufficient amount of the water so appropriated, owned and diverted, or to be in the future appropriated or diverted by the California Development Company from the Colorado river, to enable the Mexican company to furnish water for the irrigation of the lands situated in Lower California irrigable by gravity from the system of canals so to be constructed, and to be delivered by said system of canals to form an irrigation system, for the purpose of irrigating lands situated in California and in Lower California, and which agreement to deliver the said water was made dependent upon certain conditions, viz.:

1. No contract made or to be made, whereby the Mexican company agreed, or in the future should agree, to grant, transfer, deliver or in any manner convey the right to use any of the said waters, to any person or corporation should, by reason of priority in date or any other reason, give to such person or corporation any prior or superior right over any other person or corporation who should in any manner acquire from the Mexican company the right to use any part of said water.

2. The California Development Company should not be responsible for failure to deliver the water agreed to be delivered from any cause beyond its control, but it was to use due diligence in protecting the system of canals so to be constructed by it as aforesaid, and in restoring and maintaining the flow of water therein.

The Development Company agreed also to keep the canals so to be constructed by it in repair at its own cost and expense, and enlarge the same from time to time as might be necessary to enable it to comply with the provisions of the agreement. And in consideration of these obligations, the Mexican company granted, assigned and transferred to the Development company all right which it had in and to the stock of the Imperial Water Company No. 1, and all right which it had to receive any of the moneys which would be otherwise due and payable to it under the said contract with Imperial Water Company No. 1 from the sale of stock of said water company, and agreed also that it would make like assignments in the future of all rights which it might acquire under contracts similar to said contract with Imperial Water Company No. 1, which it might make with other water companies in the state of California, for the sale of stock of said companies, or the proceeds to be derived therefrom.

Ex. 34, Tr. Vol. VI, pp. 2270; for contracts therein;

Id. pp. 2284-2308.

Such is the substance of these agreements.

There were seven other water companies organized under the laws of the state of California, making eight all together, and being Imperial Water Companies Nos. 1 to 8.

It will be remembered, in the contracts already referred to, there is a limitation of Imperial Water Company No. 1 in the distribution of the water received by it, and by which limitation it is confined to certain district of lands. Now, each of these companies was organ-

ized in the same way, each had its own particular district in which the water to which it was entitled under these contracts was to be delivered and used.

A map was introduced in evidence, entitled, Map of the Imperial Settlement, showing the boundaries of the several mutual water companies, the systems of canals, etc., and marked upon this map were the boundaries of the different districts to which the several companies were limited.

Those districts were marked Imperial Water Company No. 1, its boundaries in brown; Imperial Water Company No. 4; Imperial Water Company No. 5, lying to the east of the Alamo river, marked in green; Imperial Water Company No. 6, lying to the west of the New river, and marked in red; Imperial Water Company No. 7, the boundaries marked in purple; and Imperial Water Company No. 8, marked in black.

This map is marked defendant's exhibit No. 33.

Tr. Vol. VII, page 2408.

The canal was begun in 1900, and connected with the Colorado river at a point about 100 yards above the international boundary line, and from this point to where it crosses into Mexico, the distance was about 1200 feet, and it was constructed to that point in October, 1900; there entered into Mexico, and some water was first obtained from it at what is now Calexico, in June, 1901.

Testimony of C. R. Rockwood, Tr. Vol. III, pages 1161 and 1162.

The water was brought down to the Mexican boundary line in the neighborhood of Calexico, and was, to that point, under the control of the Mexican company.

Id. Tr. Vol. III, page 1162.

And it was there delivered over to the mutual water companies.

These mutual water companies were all organized in the same way and had identically the same objects in view in every instance, and were organized to cover certain topographical districts with the idea in view that the appellant company, instead of being a retailer of water, delivering water to the individual users, became a wholesaler of water, and delivered water to the various districts.

Id. Tr. page 1163.

Imperial Water Company No. 3 never actively engaged in business at all at any time.

Of Imperial Water Company No. 2, some of its stock was issued, but it afterwards became merged into Water Company No. 4, so that at the time of the trial there was, in active existence, only six of these mutual water companies, numbered 1, 4, 5, 6, 7, and 8.

Testimony of Rockwood, Tr. Vol. III, page 1163.

Besides the contract with Imperial Water Company No. 4, there were introduced also the contracts with Nos. 4, 5, and 8, marked defendant's exhibits 35, 36 and 37.

And also No. 7, which was to be filed afterwards.

Tr. Vol. VI, p. 2308-2358.

The contract between the Mexican company and Imperial Water Company No. 8, and the California Development Company, refers to the contract of the 28th of December, 1900, between the Mexican company and the California Development Company, whereby the Development company agreed to deliver the water to the Mexican company as hereinbefore particularly set forth, and which contract was annexed to the contract with Water Company No. 8, marked exhibit A, and made a part of it, with all of its recitals and conditions. And by this contract the Mexican company agreed to deliver to Water Company No. 8, four acre feet of water for each share of its stock issued and located upon lands within its boundaries, the aggregate not to exceed 160,000 acre feet per annum, but it is in no essential particular different from the contract with Imperial Water Company No. 1.

The contract with Imperial Water Company No. 5 was made between that company and the California Development Company, and of date December 24, 1901.

This contract referred to a contract of the 15th of March, 1901, between the Mexican company and Imperial Water Company No. 5, which was similar to the contract between the Mexican company and Imperial Water Company No. 1. It recited the fact that the contract between the Mexican company and the Development company, of date December 28, 1900, by which the Mexican company had conveyed to the Development company the right to sell the entire capital stock of Imperial Water Company No. 5, had been entered into. And after many recitals of facts, it was then agreed by

the California Development Company that it would, at its cost and expense, forthwith contract and complete for the Imperial Water Company No. 5, a main canal from the point on the Salton river in San Diego county, distant about 12 miles north of the international boundary line, where the California Development Company had already begun the construction of a diverting dam, down to the lands upon which the stock of the Water Company No. 5 had already been located, and agreed to construct a system of distributing ditches with all necessary gates and water weirs to convey the waters from the canals to each governmental subdivision of 160 acres, etc. And in its main provision in regard to the furnishing of the water, the price to be paid therefor, it is substantially the same as the contracts hereinbefore already more particularly noticed.

It should be here stated that the persons who organized the California Development Company and launched the enterprise of the diversion of the waters from the Colorado river for the purpose of irrigation of Imperial Valley did, at the same time, contemplate a system of canals for the irrigation of the lands below the boundary line, and were in fact the purchasers of the 100,000 acres of land which belonged to the Mexican company; that under the laws of the Mexican Republic, as we understand it, foreign corporations were not permitted to hold lands, and the Mexican company was organized under the laws of the Republic of Mexico for the purpose of taking the title of the properties south of the boundary line, and did take the title of this 100,000 acres of land for the California Development Company, which

was the owner of the stock of the Mexican company with the exception of a few shares held by the directors of that Mexican company.

Now, in the light of these contracts and of the operations of the various companies, and the development of the various plans of the system, the plan of the system becomes quite obvious.

It was a gigantic enterprise for the settlement of tracts of land, mainly in California, partly in the Republic of Mexico, which were, in a state of nature, practically desert lands; that there was no source from which waters could be obtained for the Imperial Valley, nor probably for the lands south of the line, that would furnish an adequate supply, except the Colorado river.

The plan contemplated a canal capable of carrying a large volume of water, and to be conducted along the lines of gravity and crossing the boundary line between the two Republics near the town of Calexico, from which main canal waters could be furnished and distributed upon the lands below the boundary line, and also on those of the Imperial Valley; that to properly develop and complete a permanent system for the supply of settlers upon these lands in California, the organization of these Imperial water companies with their various numbers, was undertaken and accomplished, and at the outset of this enterprise and of its business it is undoubtedly true that the California Development Company did practically control the Mexican company and these Imperial water companies. But it will be noticed that these contracts provided for the sale of the stock of these mutual companies by the California Development Company

through its contract with the Mexican company, and this stock so sold was the evidence of the right of the holders thereof to be furnished with water to the extent provided in these contracts. The furnishing of the settlers, the stockholders themselves, and the distribution of the water to them, was through these Imperial water companies, and though, as said before, they were themselves controlled by the California Development Company at the outset, that was only because the California Development Company at the outset owned practically all the stock of each company, or at least controlled it, but as this stock was sold off, the power of the stockholders in the various companies was continually increasing, and that of the California Development Company diminishing, and at the time of the trial of this cause the stock of many of these companies had been sold off by the California Development Company until the controlling interest therein had passed into other hands. These other hands are the settlers themselves.

This stock was transferred to the settlers, ordinarily, on the basis of one share of stock for each acre of land owned by the individual settlers, and the water companies were to be furnished with water to the extent of four acre feet per annum for every share thus disposed of. And the stock so held by the settlers constituted the evidence and the measure of their rights to water from the distributing company.

But at the time of this trial, 98% of the stock of Imperial Water Company No. 1 had passed from the California Development Company into the hands of settlers, and it was then owned by them.

All of the stock of Imperial Water Company No. 4, and of No. 2 as well, which was consolidated with No. 4, has been sold to the settlers, all of the land in those districts having been taken up by the settlers who, at the time of the trial of this action, owned all of the stock of those companies.

As to the other companies, the stock had not all passed from the control of the California Development Company, and enough has been said to make it appear that while the Development company procured the incorporation of the mutual water companies, and virtually controlled those companies by its power over the stock, yet as the stock was sold, then the power of the California Development Company would grow less and less, until the control would pass into the hands of the settlers.

Tr. Vol. III, pages 1167, 1170 and 1173-1178.

And that control had passed into the hands of the settlers, and in some cases, as we have shown, the California Development Company no longer holds any stock in them.

In Imperial Water Company No. 1, it held only 2% at the time of this trial. And the board of directors is not the same, nor is the board of directors of the California Development Company, nor of the Mexican company, the same.

Such are the undisputed facts in this case concerning the inception of the enterprise, the plans which it had in view, and the methods by which those plans have been carried into effect so far as they are perfected.

Under these contracts, and in pursuance of this plan, and to supply the water, induce the settlement of these

lands, and to build up a great agricultural and horticultural settlement, the construction of the canal began in the year 1900.

C. R. Rockwood was the chief engineer of the company, although this canal was begun by George Chaffey under a contract with the California Development Company, of which Rockwood was one of the directors.

The enterprise had been conceived and its plan wrought out by C. R. Rockwood. When the first intake was cut by Chaffey, and the canal put in condition by which water could be conducted to the Imperial Valley, the settlements began, and the experiences which the company had had with these canals, and the intakes, had been that the main difficulty which they had to encounter was to prevent the intakes from filling up with silt, and with such rapidity that the water could not be delivered in sufficient quantities to the valley. The Colorado river probably carries more silt than any other river on the Continent of America. And in its flood seasons, and particularly when united with flood seasons of the Gila, the percentage of silt is enormous. And as the canals are constructed through a country of loose and porous material, they cannot be carried on a very heavy grade.

And because of the difficulty of keeping the silt out of the intakes, and to maintain the canal so that the water would flow in sufficient quantities, the second intake was cut after some two years' experience, or a little more, with the first intake.

But they had the same difficulty there, and the third

intake was cut in the fall of 1904, and completed about the middle of October of that year.

Tr. Vol. III, pages 1189, 1190 and 1198.

The California Development Company had, through C. R. Rockwood, made a thorough investigation of the conditions which might reasonably be expected to be encountered, and concerning the dangers which might be presented before they undertook the construction of the canal at all.

(Testimony of Rockwood, Tr. Vol. III, pages 1229, 1230 and 1233 to 1237.)

The Yuma gauge of the Southern Pacific Railroad Company had been itself established for 30 years or more.

Inquiry was made of various persons, including the oldest inhabitants. The result of those inquiries was that the Colorado river overflowed every year, and in the vicinity of these intakes; that the overflow waters had made these various channels which were found running in every direction through this country, and including the Alamo and New rivers.

The Yuma gauge marked about the height which the waters of the Colorado river reached at that point, and neither history nor tradition furnished any account of the formation of a lake or sea in this Salton Sink upon any other occasion than the flood of 1891.

When the first intake was constructed, headworks were put in, but the silting of the channel above those headworks soon made them absolutely useless, and a by-

pass was cut around in order to pass the water through there at all.

The character of the country we have already attempted to describe. And in that character and its climatic conditions, there was an amply sufficient explanation why it was that the waters did not gather in the Salton Sink. It was because seepage and evaporation were so enormous, and the distance so great, that notwithstanding the vast quantities of water which overflowed the banks of the Colorado river westward, and made its way in that direction, the waters pouring over this large surface and in this arid climate, and the soil peculiarly permeable to water, it disappeared before it reached the depths of the Salton Sink and formed a lake.

These conditions, and the past history of the country, and the experience of the California Development Company, were before Rockwood, the then chief engineer of the California Development Company, when he cut this new intake in 1904.

In the meantime, the settlement had grown; 100,000 acres were in cultivation, and the area was being extended, and a greater amount of water was necessary, or was reasonably supposed to be necessary, for the needs of the country.

Tr. Vol. III, pages 1194 and 1195.

These contracts with the various Imperial Water Companies had been made. The settlers had, to the extent of their settlement, taken the stock of these companies, and they were entitled to the waters under those contracts.

The floods of the latter part of 1904, and of the years

1905 and 1906, came, and they were such as were unknown, both in frequency and long continuation. And we call attention here to this fact, that while the New Liverpool Salt Company was contending, and contended successfully in the court below, that the loss of its property was due to the negligence of the California Development Company, it never made any attempt to refute the facts which we have just stated, viz., that nothing known in the history of that country, or in its traditions, was at all comparable to what occurred during the times of which we have just spoken.

Another fact upon which the evidence presents no conflict, the property claimed by the plaintiff, the entire salt plant, buildings, machinery and railroads, were utterly demolished, destroyed, every vestige of them buried up, we don't know how many feet under water before this trial concluded, and the last supplemental complaint was filed for the purpose of alleging this utter destruction.

During the progress of the trial, the plaintiff introduced evidence to establish the amount of its damages. Here again the evidence is all one way except such slight differences as may be found in the testimony of the witnesses for the plaintiff itself. The defendant offered no evidence upon this question of damages, nor was it at any time during the hearing of the cause, called upon to account for anything. The account was all made by the New Liverpool Salt Company, and consisted in an attempt to prove the amount of its loss by evidence concerning the value of the property destroyed, and its destruction. That value was sought to be proved by evidence concerning the cost of construction of the

buildings, and other things that were destroyed, and was of so uncertain and indefinite a nature, and proceeded upon lines which it is claimed by the defendant, were not the measure of the responsibility of the defendant, if responsible at all, and that the judgment, so far as the amount is concerned, is not supported by the evidence.

One item alone, but which was by far the largest of all, we refer to here in this statement of the facts out of which the various questions involved in this controversy arise.

The waters which overflowed the lands claimed by the plaintiff, dissolved the salt existing therein, and that salt is held in solution by those waters.

The testimony as to the amount of this salt in the crust, as it is termed, made by the plaintiff's witnesses, shows 1,500,000 tons, and it was valued, in the salt crust, at 25 cents a ton. And in making up the judgment of the court, that claim was allowed for the full amount, $375,000, which, of course, proceeded upon the theory that that salt was a total loss, absolutely destroyed forever.

As to the other items constituting damages decreed in this case, the objections to them are, that the evidence proceeded upon wrong theories, and even if correct in theory, was too indefinite to furnish any conclusion at all.

The questions involved in this cause, and arising out of the facts above set forth, are the following:

1. WAS THE DEMURRER TO THE BILL, FILED IN THIS CAUSE, PROPERLY OVERRULED?

2. Was the plaintiff entitled to an injunction at all, of any kind, and to what extent?

3. Was the plaintiff entitled to, and could the court grant, the injunction in this decree without bringing in the Imperial Water Companies, and each of them, in active operation, and the Mexican Company, as parties defendant herein?

4. If the Mexican Company could be dispensed with, were not the Imperial Water Companies necessary parties before any such injunctive relief could be granted?

5. Assuming the bill to be good as against a demurrer, was the decree for damages properly given under the evidence in the case?

6. Was the defendant guilty of negligence in the construction of its canals in omitting to provide means for controlling the flow of the water into the intakes?

7. If it was guilty of such negligence, was that negligence the proximate cause of the injury?

8. Assuming such negligence to have existed, did it contribute to the injury?

9. Was not the overflow and the formation of the Salton Sink, and the destruction of plaintiff's property, caused by the act of God, and not the negligence of the defendant?

10. If the defendant were negligent, and that negligence contributed in some degree to the loss, was the New Liverpool Salt Company entitled to

RECOVER OF THE DEFENDANT ANY DAMAGE BEYOND THAT CAUSED BY THE NEGLIGENCE OF THE DEFENDANT?

II. DID NOT THE COURT ERR IN GIVING JUDGMENT IN FAVOR OF THE PLAINTIFF FOR DAMAGES, AND ALSO IN GIVING THE DECREE FOR THE INJUNCTION?

The assignment of errors will be found in the transcript, volume VI, pages 2371-2376.

The cause was argued before the court and submitted and afterwards decided by the court, and in delivering the opinion or conclusions at which the court had arrived, the specific points ruled were set forth by the learned judge. Those conclusions will be found in Transcript, volume I, pages 128-132. In the course of that opinion the court said, among other things, that the complainant was entitled to the compensatory relief claimed at the hearing and shown by the annexed summary of damages, omitting, however, the sums claimed for "railroad" and "loss of business." At page 132 that summary of damages will be found, and from the sum total are to be deducted the damages claimed for the railroad, $42,500.00, and the loss of business, $2,500.00, making a total of $45,000.00. These items were not allowed by the court and when deducted from the sum total will give the amount for which the judgment was entered in this cause.

The appellant now specifies the following particulars in which the decree in this cause is alleged to be erroneous and the errors relied upon and intended to be urged by the appellant.

1. The court erred in overruling the demurrer to the bill in this cause.

2. The court erred in deciding that the jurisdiction of the circuit court as a court of equity to restrain the wrongful diversions of water, draws to it the cognizance of the damages, if any, which had resulted from such diversions.

3. The court erred in deciding that neither the Mexican company nor the mutual water companies were necessary parties to the action.

4. The court erred in deciding that the said companies were organized by the defendant and are now acting as instrumentalities for effectuating the diversions complained of and should be considered for the purposes of this suit as identical with defendant or as mere agency corporations.

4. The court erred in deciding that even though they were to be considered separate and distinct companies and not agents, that they were joint tort-feasors and suit might be brought against one or more or all of them at complainant's election, and in deciding that there was no defect of parties therein.

5. The court erred in deciding that if when the suit was brought there were grounds for injunction, such grounds had not been removed by the destruction of complainant's works and by the closing of defendant's intakes.

6. The court erred in deciding that the complainant was entitled to have its free-hold protected under the evidence in this case without regard to the amount of damage threatened.

7. The court erred in deciding that the evidence did not show such resulting damage to the settlers in the Im-

perial country from the injunction as would justify its refusal if complainant were otherwise entitled to it.

8. The court erred in deciding that the waters which overflowed the complainant's land and destroyed its property were largely, if not entirely, the waters diverted from the Colorado river through defendant's intakes.

9. The court erred in deciding that the defendant was negligent in not selecting proper places for the intakes and in not providing suitable head gates to control the flow of water through the intakes.

10. The court erred in deciding that the defendant's said negligence was the direct and proximate cause of the overflow of complainant's lands and the resulting loss of its property.

11. The court erred in deciding that the floods of 1905 in the Colorado river would not have overflowed the banks of the river and submerged complainant's lands if the defendant's intakes had not existed.

12. The court erred in deciding that the complainant was entitled to the injunction in this cause.

13. The court erred in deciding that the complainant was entitled to the compensatory relief sued for.

14. The court erred in granting the injunction in this cause in the absence of the said Mexican company and the said several Imperial water companies, and the court erred in decreeing the injunction in this cause.

15. The court erred in granting the judgment for damages in this case because the evidence is insufficient to prove any damage to the complainant from any negligence of the defendant, or to justifying a judgment against the defendant for any damages.

16. The court erred in deciding that the flooding of the Salton Sink in the years 1904 and 1905 and 1906 and the destruction of the complainant's property was occasioned by the fault of the California Development Company or by any negligence of said company.

17. The court erred in deciding that the flooding of the Salton Basin with water and the destruction of the complainant's property occurred through the negligence of the defendant and not the act of God.

18. The court erred in deciding that the loss of salt destroyed at the mill and the destruction of the machinery of the complainant and the buildings of the complainant, resulted from the negligence of the defendant and not from the complainant's own negligence.

19. The court erred in giving a decree in this cause either for the injunction or the damages or any part of said damages.

20. The evidence in the cause was insufficient to prove the damages alleged and for which the judgment was given, or any item thereof, and the evidence in the cause is too uncertain to prove or establish any amount of damage suffered by the complainant.

21. The court erred in giving judgment in favor of the complainant for the sum of $456,746.23 because the complainant was not entitled to recover any damages at all in this suit.

22. If the complainant is entitled to recover damages at all the court erred in awarding damages up to the time of judgment.

23. The court erred in permitting the complainant to file the several supplemental bills herein.

BRIEF OF THE ARGUMENT.

I.

A. It is a rule of the federal courts that legal and equitable causes cannot be blended together in one suit in a Circuit Court of the United States, nor are equitable defenses permitted in an action of law.

Scott v. Armstrong, 146 U. S. 499, 36 L. Ed. 1059, 1064;
Scott v. Meely, 140 U. S. 106, 35 L. Ed. 358-360;
White v. Berry, 171 U. S. 366, 43 L. Ed. 199;
Cates v. Allen, 149 U. S. 451, 37 L. Ed. 804, 807-808;
Van Norden v. Morton, 99 U. S. 380, 25 L. Ed. 453;
Hurt v. Hollingsworth, 100 U. S. 100, 25 L. Ed. 569;
Mansfield v. Scott, 111 U. S. 386, 28 L. Ed. 465;
Cherokee Nation v. Southern Kansas Railway Company, 135 U. S. 641, 34 L. Ed. 295, 300.

The constitution of the United States secures the right of trial by jury in all actions at law where the amount in controversy exceeds twenty dollars ($20.00) and this right to a jury trial in a federal court cannot be defeated by blending legal and equitable claims.

U. S. v. Ingate, 48 Fed. 253, 256;
Eng. v. Russell, 71 Fed. 821, 824;
Harrison v. Farmers etc. Company, 94 Fed. 729.

When a suit, involving both legal and equitable remedies is brought in a state court and where the laws

of the state permit the joinder of such actions in one suit and the cause is removed to a federal court, the pleadings must be recast and the causes of action stated in accordance with the course of proceedings on the law and equity sides of the court respectively.

Perkins v. Hendryx, 23 Fed 418;
La Croix v. Lyons, 27 Fed. 403;
Jones v. Mutual Fidelity Company, 23 Fed. 506, 517;
In re Foley, 76 Fed. 390;
Fletcher v. Burt, 126 Fed. 619;
1 Beach Mod. Eq., Secs. 5-6.

And where there is a plain, adequate and complete remedy at law, the plaintiff must not only proceed at law because the defendant has a constitutional right to trial by jury, but even if the objection to the jurisdiction in equity of a national court is not made by demurrer, pleading or answer, or suggested by counsel, it is the duty of the court, where it clearly exists, to recognize it at its own motion and give it effect.

India Land and Trust Company v. Shoenfelt (8 C. C. A.), 135 Fed. 484, 485-87.

B. The bill in this case does unite an action at law for damages with the bill in equity for an injunction. It will scarcely be denied that the complaint filed in the Superior Court of Riverside county sets forth a cause of action for damages [Transcript pages 7-13], and which is followed by an allegation that no provision had been made to control the flow of the water, and the defendant would, unless constrained by the court, continue to di-

vert from the Colorado river large quantities of water, which would naturally flow in another direction, so that the same would flood and overflow the lands of plaintiff and thereby destroy the property and business of plaintiff and occasion great and irreparable injury. [Complaint, paragraph 12, transcript, pages 13 and 14.] Then followed allegations concerning the damages already suffered with a prayer for an injunction and for a judgment in favor of plaintiff for the sum of eighty-seven thousand dollars ($87,000), *the damage already suffered as hereinbefore set forth in costs of suit, etc.* [Transcript, pages 15 and 16.] That this was an action for damages in the state court for injuries past and for an injunction against future injuries in the complaint framed in accordance with the practice in the state courts, is, we think, indisputable. While the admissions of counsel or their conduct cannot deprive a federal court of equity of jurisdiction any more than a consent could confer jurisdiction, is doubtless true, however that their action in this case shows that they themselves view the complaint in the state court exactly as we do, for when the cause came into this court, they, evidently under the belief that they were required to elect and to replead in the federal court, did file the bill herein and several supplemental bills [Transcript, volume 1, pages 61-72], to which bill a demurrer was filed. [Transcript, Vol. 1, pages 72-74.] This demurrer was overruled. [Transcript, Vol. 1, pages 75, 76 and 77.] On January 10th, 1906, the court granted the complainant leave to file the supplemental bill [Transcript, pages 78-79], and in that supplemental bill additional damages were

claimed. [Transcript, Vol. 1, pages 79-81.] The supplemental bill was demurred. [Transcript, Vol. 1, pages 81-84.] This demurrer was overruled. [Transcript, Vol. 1, pages 85, 86.] By the order permitting the said supplemental bill, it is recited that it was allowed against the objection of the solicitor for the defendant. [Transcript, Vol. 1, pages 78, 79.] An answer was filed to the bill and supplemental bill. [Transcript, Vol. 1, pages 87-99.] Subsequently the defendant was granted leave to file an amended and supplemental answer, which was filed December the 27th, 1906. [Transcript, Vol. 1, pages 102-123.] Afterwards leave was granted to the complainant to file a further supplemental bill. Defendants objected [Transcript, Vol. 1, pages 125, 126], and it was filed on the 19th day of December, 1907. [Transcript, Vol. 1, pages 126, 127.] Each of these supplemental bills, however, added nothing to change the character of the proceedings, but simply averred damages accruing subsequent to the filing of the previous bill and supplemental bill. Thus, it will be seen that the complainant did elect and proceed on the equity side of the court and filed its bill upon that theory. Now a comparison between the complaint in the Superior Court and the bill filed in the Circuit Court will show that they differ in nothing except that in the former court it called itself the plaintiff, in the United States Court "Your Orator," in the Superior Court it demanded damages, and in the Federal Court it prayed for an accounting. If in the state court the complaint united a suit in equity for an injunction with an action at law for damages, that character was not done away with by the bill filed in the Federal Court.

The distinction between legal and equitable actions cannot be defeated by mere names.

C. It is sought to rescue this bill from the demurrer upon the ground that the court having obtained jurisdiction in equity for the purposes of an injunction, may proceed to the relief which was actually given in this cause. The principle expressed sometimes, thus, that when a court of equity has acquired jurisdiction as such court of equity, it will determine the whole case and give whatever relief may be proper, both to avoid a multiplicity of suits or to the end that justice may not be done by piecemeal. If that be a sufficient reason here then that principle was equally applicable in the Superior Court of the county of Riverside, sitting as a court of equity, and a repleading or a recasting of the pleadings in the federal court was wholly unnecessary.

D. The bill cannot be sustained upon the theory that the compensatory relief was to be obtained through the medium of an accounting. There isn't an element of accounting in the case. Courts of equity to be sure have jurisdiction independently of other equitable grounds in suits for an accounting and it may make compensation in many cases where the jurisdiction does rest upon other grounds, though in the particular case an accounting might be one more particularly the subject of legal action, but the term "account" has a well settled legal distinction. It is a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contracts or some fiduciary relation. Equity has concurrent jurisdiction with courts of law in matters of account on three grounds.

1. Mutual accounts.

2. Dealings so complicated that they cannot be adjusted in a court of law.

3. The existence of a fiduciary relation between the parties.

In addition to these particular grounds of jurisdiction equity will grant discovery in cases of account on the general principles regulating discovery.

1 Bouvier's Law Dictionary, word "Account."

The foundations of equity jurisdiction in matters of account and illustrations of the exercise of that jurisdiction are fully considered and set forth in 1 Story's Eq. Jurisprudence, Secs. 442, 443, 446, 449, 450, 455, 457, 458, 509, 510, 513, 514a, 515-518a, 519, 520.

O. Pomeroy Eq. Jur. S. 178;

3rd *Id.*, Secs. 1420-1421;

Meres v. Chrisman *et al.*, 7 B. Monroe 422, 423;

Echols v. Hammon, 20 Miss. 177-178;

Fowle v. Laurason, 5th Peters 495,

in which Chief Justice Marshal said:

"That a court of chancery has jurisdiction in matters of account cannot be questioned; nor can it be doubted that this jurisdiction is often beneficially necessitated; but it can be admitted that a court of equity may take cognizance of every action for goods, wares and merchandise sold and delivered, or of money advanced where partial payments have been made, or of every contract, express or implied, consisting of various items on which different sums of money have become due and different payments have been made. Although the line

may not be drawn with absolute decision, yet it may be safely affirmed that a court of chancery can draw to itself every transaction between individuals in which an account between parties is to be adjusted."

See further upon the general questions herein involved:

Askew v. Myrick, 54 Ala. 30;
Stone v. Stone, 32 Conn. 142, 144;
Johnson v. Conn., Book 21 Conn. 148, 156;
Badger v. McNamara, 123 Miss. 117;
Vose v. Philbrook, Fed. cases No. 17010, Vol. 28, page 1293, particularly pages 1296-1297.

It is submitted that this bill cannot be sustained as one for an accounting, nor are these items of damage in the nature of an accounting, whether in an action at law or a suit in equity, founded upon an accounting. This suit is on the equity side only insofar as it is a suit for an injunction.

E. The sole ground upon which the right to railroad damages in this case can rest is upon the principle that having acquired jurisdiction for the purposes of an injunction the court will proceed to give complete relief and make compensation, no matter what may be the character of the compensation to be given. It is submitted that this ground fails here. The act of congress declares that a court of equity has no jurisdiction where there is an adequate remedy at law and the meaning of that term is defined to be that which is not in its nature or character fitted or adapted to the end in view.

Thompson v. Allen, 115 U. S. 554; 29 L. Ed. 472;

Rees v. Watertown, 19 Wall. 107; 22 L. Ed. 72;
Safe Deposit Etc. Company v. Anniston, 96 Fed. 663;
Van Wyck v. Knevals, 106 U. S. 360; 27 L. Ed. 201;
Southern Pacific Railroad Company v. Goodrich, 57 Fed. 879, 882;
Whitehead v. Shattuck, 138 U. S. 151, 34 L. Ed. 873;
Northern Pacific Railroad Company v. Amacker, C. C. A. 49 Fed. 537.

Under no head of chancery jurisdiction can a federal court sustain a bill to obtain only a decree for the payment of money by way of damages when the like amount can be recovered at law.

City of Parkersburg v. Brown, 106 U. S. 500, 27 L. Ed. 238;
Ambler v. Choteau, 107 U. S. 586, 27 L. Ed. 322;
City of Litchfield v Ballou, 114 U. S. 190, 29 L. Ed. 132;
Buzard v. Houston, 119 U. S. 352, 30 L. Ed. 451;
Zeringue v. Texas, etc. R. Co., 34 Federal 243.

If the wrong complained of can be adequately compensated by a pecuniary sum the remedy is at law and the injunction will not issue.

Wagner v. Drake, 31 Federal 849;
Hempsley v. Myers, 45 Fed. 287.

See also:

Mills v. Knapp, 39 Fed. 592;
Frey v. Willoughby (C. C. A.), 63 Fed. 865;

Thomas v. Council Bluffs Cannon Co., 92 Federal 424.

The constitutional right of a jury trial in an action at law cannot be defeated, avoided or evaded by merely linking an action at law with a suit in equity.

Jones v. Mutual Fidelity Company, 506, 517-519.

The principle, that courts of equity, having acquired jurisdiction, will proceed to do complete justice, is most frequently applied to accountings incidental to the complete determination of a suit in which the court has acquired jurisdiction upon some other grounds. The other grounds, too, are generally bills for a discovery and in order to entitle plaintiff to relief, which relief was obtainable by an action at law, the bill must be both for discovery and relief.

Cook v. Davis, 32 N. E. 176-177;
Patterson v. Glassmire, 31 Atl. 40.

In that case it was said, among other things:

"In this country it is generally accepted that a court of equity has power to decree compensation as incidental to other relief. * * * Not indeed as damages in the sense in which the law gives them, but as a substitute for damages. * * * By some the power is based upon the necessity of preventing a multiplicity of suits. * * * By others from the necessity of doing complete justice as between the parties. * * * And the rule above set forth is, of course, to be accepted with the qualification that a court of equity will not give both legal and equitable relief at the same time, or, in other words, decree the specific performance of the contract,

while at the same time giving damages such as will compensate for its permanent abrogation."

They refer to the case of Peltz v. Eichele, 62 Mo. 171; and then said the court:

"In the present case the circumstances are further complicated by the entrance of a third party in the field whose presence very probably contributed to plaintiff's loss, but in what measure cannot be ascertained. The amount by which the plaintiff's income fell short would accordingly be no measure of their damages; and in such case it would seem, recourse must be had to estimate defendant's profits. * * * This method is well recognized in equity, being based on the principle that a wrongdoer shall never profit by his own wrong; and the compensation is computed by the same rule that courts of equity apply to a trustee who has wrongfully used the trust property for his own advantage. * * * 'The court does not, by an account, accurately measure the damages sustained. * * * But, as the nearest approximation which it can make to justice, takes from the wrongdoer all the profits which he has made by his piracy, and gives them to the party who has been wronged.'"

31 Atl., page 43.

As illustrating the circumstances under which this doctrine is applied, see further:

Trammell v. Craddock, 13 So. 911-912;

Virginia & A. Mining & Mfg. Co. v. Hale, 9th So. 258.

See Stieffel v. New York Novelty Co., 43 N. Y. Sup. 1012, where the relief granted was obviously a mere incident to the general relief that was being sought, namely, the proper appropriation of the assets to the payment of creditors as required by the statute.

United States v. Guglard *et al.*, 79 Fed. 21, was a suit to enjoin the cutting of timber and where an accounting was taken for the timber, trees and wood which had already been cut and received by the defendants, and evidently proceeded upon that general principle that the wrongdoer, making a profit by his wrong, will be compelled to account for it.

Vicksburg & Yazoo Tele. Co. v. Citizens Tele. Co., 89 Am. State Rep. 656, 30 So. 725,

Is another case illustrative of the circumstances under which this rule is applied. There the court said, among other things:

"The ascertainment of these damages is a mere incident to the subject matter of equitable cognizance confirming the chancery jurisdiction, to-wit: the enforcement on the theory of a trust of complainant's equitable right to satisfaction out of the property of the Citizens Telephone Company in the hands of the Cumberland Telephone Company. It is that subject matter which gives the jurisdiction. The ascertainment and award of the damages is a mere incident in the exercise of that jurisdiction."

89 Am. St. Rep. 659.

In Brown v. Solary, 19 Southern 161, the lands in controversy were principally valuable for

their phosphates and the defendants had entered upon the land and were mining it for the phosphates and had taken phosphate from the soil, of great value, and an accounting was necessary to ascertain the amount. This principle is frequently applied in suits to recover mining property or for trespasses upon it and where the defendant has not only entered upon it but taken minerals therefrom.

Pierpont v. Fowle, 19 Fed. Cases, page 652, case 11152, and especially pages 654-655, where this doctrine is discussed and the principles upon which the rule is applied are considered. Among other things it is said:

"Hence it follows that a case will not always be allowed to go on in chancery merely because the power there is concurrent with that at law, but it must be fuller, more appropriate or better. * * * Some cases, cited to show that the United States courts here will proceed to sustain suits in equity, when the relief is entirely ample at law, rest upon a different principle when analyzed."

And again:

"Asking a discovery separately or with other matter was thus often, enough to give jurisdiction in chancery. * * * But *quaere*, unless the other matter was of a chancery character."

And again:

"My own impression is that from a strong fondness for a trial by jury, the common law and all its principles and forms, rather than those in equity, it was the design of our fathers, in that clause of the judiciary act, not to permit proceedings to go on in chancery, if it turned out

in the progress of the inquiry that full and adequate relief could be had at law, and therefore no necessity existed to go into chancery, or after being in to proceed further there."

19 Fed. Cases, page 656.

It is submitted that from these authorities it is not true that every bill filed in equity upon some well recognized head of equity jurisdiction can draw to that court as incidental to the relief, every sort of purely legal action that might also be involved in the controversy. But if the rule has any limitations at all, this case is clearly outside of the rule. If it be not, the rule of the state court that a suit in equity for an injunction may be coupled with an action at law for the damages already accrued, is equally the rule of federal practice and the recasting of the bill was unnecessary.

II.

The court erred in deciding that the jurisdiction of the Circuit Court, sitting as a court of equity, to restrain the wrongful diversions of water, draws to it the cognizance of the damages, if any, which had resulted from such diversion.

This question, of course, needs no separate consideration. An examination of the cases which we have already cited in support of the proposition that the bill was demurrable will show that it is not true that a bill in equity in the federal courts, bringing the case within the jurisdiction of that court, will draw to that jurisdiction

every sort of legal action or warrant every sort of legal relief as incidental to it. The cases all show that the legal relief must be of a kind similar to that over which equity has jurisdiction independently of any other kind. We do not mean that it must be the same. Thus, where a real account is to be taken, in order to give complete relief in equity, the court will proceed to take that account although the accounting itself in the particular instances might be such that a court of law would have jurisdiction, though perhaps equity would not take jurisdiction independently of other grounds, but it must be an actual accounting. So, too, as already stated, where, in addition to a legal wrong occasioning legal damages, the defendant has made some profit or taken to himself the property of the complainant, there the bill in equity to restrain further depredations gives jurisdiction to compel an accounting for that which the defendant has taken from the plaintiff. Cases, too, are numerous where in bills to restrain the infringement of a patent, the defendant may be called upon, in a court of equity, to account for the profits accruing to it by reason of the infringement. But it is not true that because a court of equity has acquired the jurisdiction upon some particular ground of equitable jurisdiction, that from thence to the end of the case all distinctions between law and equity are abrogated, and the court becomes a court of law as well as of equity.

III.

The court erred in deciding that neither the Mexican company nor the mutual water companies were necessary parties to the action.

The contracts between these companies have already been referred to. They are contained in the red book and in the Transcript, Vol. I, page 226-249, will be found the contents of the red book. The first is the agreement of July 24th, 1901, between the Mexican company and Imperial Water Company No. 1 and the California Development Company. This agreement referred to the contract of April 6, 1900, between the Mexican company and the Imperial Water Company No. 1 and which was annexed to it and made a part of it and marked exhibit A.

Trans. Vol. I, page 227.

It referred then to the contract between the California Development Company and the Mexican company, of date the 28th of December, 1900, and annexed that contract and made it exhibit B. It recited that the C. D. company had sold a large amount of the capital stock of the water company and had constructed a part of the irrigating system contemplated in the contract exhibit B and was engaged in the further construction thereof.

Trans. Vol. I, pages 227-228.

Recited that the waters conveyed to the Mexican company by the C. D. company under the contract exhibit B are the waters which were to be used by the water company.

Trans. Vol. I, page 228.

By that contract, in its first article, they rescinded the contract of April 6th, 1900, marked exhibit A. The rescission was not to affect any act which had been done by either of the parties under it. Second, there was to be delivered by the Mexican company to the water company four acre feet of water per annum for each outstanding share of stock of the Imperial Water Company No. 1, but not to exceed in all 400,000 acre feet.

Vol. I, page 228, Par. II.

The water was to be delivered at a point upon the International boundary line where the main canal crossed the line and being a point about 2¼ miles easterly from monument 220 of that boundary line, and after that delivery the first party had no interest in or control over the water.

Trans. Vol. I, pp. 228-229, Par. III.

There were then provisions for the sale of the capital stock by the C. D. company, except 2,500 shares, which was to be retained by the water company.

Trans. pages 229-230, Par. IV.

The water company was bound to receive and pay for at least one acre foot for each share of its stock outstanding each year. The price to be paid for water was 50 cents per acre foot annually, which amount was never to be increased.

Vol. I, page 230, Par. 5.

It was agreed that all water received by the water company prior to the 1st day of July of each year should be paid for on the 1st of July and all sums due for water

received after that were to be paid on the 1st day of January of the following year.

Trans. Vol. I, pp. 230-231, Par. 6.

The C. D. company agreed to construct and maintain the canal and of sufficient capacity to convey an amount of water sufficient at all times for the irrigation of the lands owned or located by the stockholders, and being an amount in the aggregate not less than sufficient to furnish four acre feet per annum for each outstanding share. The canal to be owned and maintained by the California Development Company, which had the exclusive right to navigate the canal and develop and use all power that might be developed in the waters flowing therein, and agreed to convey water to be delivered by the Mexican company to the water company through said canal to the lateral ditches to be constructed by it as thereinafter provided.

Trans. Vol. I, page 231, Par. 7.

If the California Development Company failed to construct or maintain the canal or deliver the water to be conveyed to it to the lateral ditches to be constructed by it, then the water company had the right to enter upon the canal and make such additions, etc.

The substance of this contract we have set forth before in the statement of facts and we call attention to the whole of the contracts as contained in the three papers referred to.

The agreement between the California Development

Company and Imperial Water Company No. 4 is set forth—

Trans. Vol. I, pp. 250-261.

And between the Mexican company and Imperial Water Company No. 6—

Trans. Vol. I, pp. 262-269.

And with Imperial Water Company No. 7, between the three companies, namely, the Mexican company, Imperial Water Company No. 7 and the California Development Company—

Trans. Vol. 1, pp. 269-285.

And it was shown in the testimony that all of the other contracts were substantially the same, and those to which we have last referred to are, so far as the present question is concerned, in substance the same.

While it is true that these companies and the Mexican company were organized by the stockholders of the California Development Company, still they never were either mere agencies of or identical with the California Development Company, or mere instrumentalities of that company and directed to the same end. It is true that the California Development Company was the corporation organized at the instance of Mr. C. R. Rockwood, who planned this enterprise, and its object was to take the waters of the Colorado river and conduct them into the Imperial Valley through the northern portion of Lower California and there to be used on both sides of the international boundary line, for irrigation, domestic and all other lawful purposes. The plan contemplated from the beginning was that so far as the Cali-

fornia Development Company was concerned, it was seeking its fortune or the fortune of the stockholders in the building up of a great canal system and for the diversion of waters and the sale or distribution thereof perpetually. To the success of this enterprise the colonization of these lands and the bringing of them under cultivation and the building up of a great settlement with all agencies and industries of modern civilization was, of course, essential. But the Mexican company was organized because a foreign corporation is not permitted by the Republic of Mexico to own lands, and one of the things which they were contemplating should be accomplished through the Mexican company, was the acquisition of about 100,000 acres lying immediately south of the boundary line and susceptible of irrigation by these waters. On the north side of the line the lands were almost entirely public lands of the United States and the California Development Company had to depend upon drawing to that section of the country settlers who were seeking homes. These Imperial water companies, 1 to 8, were all formed for the same purpose, namely that as lands were acquired, either the Mexican company or California Development Company, and after 1901, the latter, would sell the stock to these settlers and that stock would represent their right to water. Each share was entitled to four acre feet per annum and was bound to take one acre foot. Under this system the Imperial Valley did become a fertile section of the country and a large number of people settled there and did, at the time of this trial, number more than 10,000 and they had built up four or five towns, all dependent upon

water for irrigation from the Colorado river, and water for all other purposes from the same source, there being no other source of supply, and as this country settled up the stock was sold off to the settlers and in Imperial Water Company No. 1 ninety-eight per cent had been sold at the time of this trial. In some of them, the stock had all been sold; so that while in the beginning the California Development Company did, doubtless, have the power to control these Imperial water companies, yet that control was not the thing which they had in view and the influence of the California Development Company grew less and less as the stock was sold, until, when this case was tried, as to some of those companies, it had no voice whatever and in others, so little as to practically amount to nothing. Such were the conditions proven at this trial.

See Trans. Vol. III, pp. 1167, 1170, 1173 to 1178.

Leaving out of sight this present controversy, would anyone doubt that the position of the C. D. company and these various water companies and the Mexican company is really hostile? Suppose the California Development Company should fail or refuse to furnish to anyone of these water companies water on demand, which demand was within the limits of the contract rights, would not the water company have a right of action for damages or to sue for a specific performance or to obtain a writ of mandate to compel the furnishing of it? Would not the settlers on the lands sold or leased and now cultivated in Lower California on the Mexican company's lands have the same right? Would it be any defense, in any such action, for the California Develop-

ment Company to plead that it was enjoined from delivering the water or was only permitted to deliver it upon certain conditions and that those conditions might be violated by responding to the demand made upon it? It certainly would not. The water company, not being a party to the suit, is not affected by the injunction nor is the judgment either a bar to any sort of an action by it, nor would it be admissible in evidence against them.

Mr. Daniell says:

"It is the constant aim of a court of equity to do complete justice by deciding upon and settling the rights of all persons interested in the subject of the suit, so as to make the performance of the order of the court perfectly safe to those who are compelled to obey it, and to prevent future litigation. * * * For this purpose, all persons materially interested in the subject ought, generally, either as plaintiffs or defendants, to be made parties to the suit, or ought, by service upon them of a copy of the bill, to have an opportunity afforded of making themselves active parties in the cause if they should think fit. In pointing out the application of this rule I shall consider it, firstly, with reference to those whose rights are concurrent with those of the party instituting the suit; secondly, with reference to those who are interested in resisting the plaintiff's claim.

"With respect to the first class, it is to be observed that it is required in all cases where a party comes to a court of equity to seek for that relief which the principles there acted upon entitled him to receive, that he should bring before the court all such parties as are necessary to enable it to do complete justice; and that

he should so far bind the rights of all persons interested in the subject matter as to render the performance of the decree which he seeks perfectly safe to the party called upon to perform it, by preventing his being sued or molested again concerning the same matter either at law or in equity. For this purpose, formerly, it was necessary that he should bring regularly before the court, either as co-plaintiffs with himself, or as defendants, all persons so circumstanced that unless their rights were bound by the decree of the court, they might have caused future molestation or inconvenience to the party against whom the relief was sought."

1 Daniell's Chancery Pr., Perkins' Ed., top paging 245-246; Ch. V, mar. pp. 240-241.

In this case it is obvious that the injunction sought is really a mandatory injunction. It is not claimed that the case is such that the court ought not absolutely to restrain the diversion of the water from the Colorado river, but that it should not do so unless it constructed headworks for the control of the flow of that water, and though prohibitive in form, it was in fact mandatory.

Stewart v. Superior Court, 100 Cal. 543, 546-547.
Mark v. Superior Court, 129 Cal., 1, 5-7.

Now, another fact which appears in this case is that this intake No. 3 is on land belonging to the Mexican company and the canal itself extends a distance of thirty or forty miles on its lands.

Trans. Vol. III, pages 1158, 1161, 1162, 1184, 1200.
Maps, Vol. VII, page 2404.

Now, while undoubtedly a court of equity has the power to issue mandatory injunctions either preliminary or final, they are more loath to do so than to grant a merely prohibitive injunction. It has been said that mandatory injunctions are issued only in extraordinary cases whether the injunction sought is permanent or preliminary.

Gardner v. Strover, 89 Cal. 26.

But without regard to the form of the injunction, it is submitted that the presence of these water companies and the Mexican company, and certainly the former, was necessary to the granting of any injunction in this cause against the defendant. In support of this proposition we call attention to the following cases:

Consolidated Water Co. v. City of San Diego, 93 Fed. 849;

Lawyer v. Cipperly, 7 Paige's Ch. 281, 282;

Parrott v. Byers, 40 Cal. 614, 624;

Tyson v. Virginia & T. R. Co., Fed. Cas. No. 14; 321; 24 Fed. Cas. pp. 493, 495;

Berry v. Berry's Heirs, 3 T. B. Monroe, (Ky.) 263, 264-265;

Sweet's Heirs v. Biggs and Craig, 5 Littell (Ky.) 18;

Samis v. King, 40 Conn. 298;

Morse v. Machias Water Power and Mill Co., 42 Me. 119, 127-129;

Brandis v. Grissom, 60 N. E. 455;

Bradley v. Gilbert, 39 N. E. 593, 595;

Kussem v. Sanitary District of Chicago, 61 N. E. 544-553;

New York Bank Note Co. v. Hamilton Bank Note Engraving & Printing Co., 31 N. Y. Supp. 1060, 1063-1064;
Jeffries-Basom v. Nation, 65 Pac. 226.

IV.

The court erred in deciding that the said water companies and the Mexican company were organized by this defendant and now acting as instrumentalities for effectuating the diversions complained of and should be considered for the purposes of this suit as identical with the defendant or as mere agency corporations.

The facts have been sufficiently presented upon which the correctness of this decision depends. Technically we do not see just how one corporation can organize another. The organization of other corporations is never, so far as we know, one of the purposes or objects, of any corporation, nor does the statute authorize such a thing. We suppose, however, the meaning here is that the same persons or same interests which organized the one caused the other to be organized and that is true here, but it does not at all follow that they become thereby identical or that either is to be regarded as a mere instrumentality of another or an agent of the others.

The Mexican company is the owner of land, the Imperial water companies corporations having the right to demand and receive from the California Development Company water to the extent of the contract rights and are engaged in the business of distributing water. The

California Development Company is the constructor of the canals and has diverted and appropriated the water and is engaged in furnishing the same to various companies in California and to others in Lower California for use and for a compensation or rate to be paid to it. They never were identical. They never had the same objects in view. While, as we have already stated, the business of both the Mexican company and Imperial Water Company was essential to the success of the C. D. company, that does not make them either identical with or agencies or instrumentalities of the California Development Company.

Even if the Mexican company and the C. D. company and the Imperial water companies had the same stockholders and directors, this does not make them identical nor one company the agent of the other. Nor does the fact that the stock of the Mexican company is owned by the California Development Company, mainly or even wholly, affect the question.

In Leavenworth v. Chicago, Etc. Ry. Co., 134 U. S., 688, 707, Justice Blatchford delivering the opinion, said:

"I am unable to see anything in the fact that some of the same men were found to be trustees in this deed and directors in the Rock Island Company, and that directors in the Southwestern Company were also directors in the Rock Island Company, which should block the course of justice, paralyze the powers of the court, and deprive the creditor corporation of all remedy for the enforcement of its lien. If it could show that the Southwestern Company did not owe this interest, or that the Rock Island Company had in its hands the means of

the Southwestern Company to meet this obligation, and that by reason of collusion between those who controlled both companies this fact was suppressed or concealed, it would present a strong case for relief. But this would be actual fraud, and one not necessarily growing out of the influence of the Rock Island directory over that of the Southwestern. Notwithstanding this commingling of officers, *the corporations were distinct corporations.* They had a right to make contracts with each other in their corporate capacities, and they could sue and be sued by each other in regard to these contracts; and the question is not, could they do these things, but have the relations of the parties—the trust relations, if indeed such existed—been abused to the serious injury of the Southwestern Company."

In Pauly v. Pauly, 107 Cal. 8, 19, the Supreme Court of California approved of this decision, and quoted the passage just set forth.

The case was approved, also, in San Diego v. Pacific Beach Company, 112 Cal. 53, 59, and this language was again quoted at page 59, and then the Supreme Court of California said:

"We will notice one or two other recent authorities to the same point. In Coe v. East etc. Ry. Co. 52 Fed. Rep. 543, Judge Pardee says: 'That the East & West Railroad Company could lawfully contract with the Cherokee Iron Works, although all the stockholders of the one were also stockholders of the other, in the absence of fraud and misrepresentation, is indisputable; nor would the fact that the two corporations had substantially the same directors, who were the active agents

negotiating the contract, render it void—at worst, only voidable, but subject to ratification.'"

On this same subject we also call attention to Coe v. East & W. R. Co., 52 Fed. 531-542-543.

In Cunningham v. City of Cleveland, 98 Fed. 657, 665, it is said:

"It is a fact that the incorporators of the Water & Electric Light Company were stockholders of the West, Virginia Company, but that circumstance does not show that one company was to be a mere cloak for another. It is a common plan to have a parent company engaged in a national business of installing local companies and having stock in the local companies, but they are distinct legal entities, and the interest of the larger company in the smaller is no reason for holding otherwise."

See also,

Phinizy v. Augusta R. Co., and

Central Trust Co. of New York v. Port Royal & W. Ry. Co., 62 Fed. 771, 773-774;

People v. American Bell Telephone Co., 22 N. E. 1057;

U. S. v. Telephone Co., 29 Fed. 17;

Commissioner v. Telephone Co., 18 Atl. 122.

From which latter case we quote this:

"For one person to supply the means to another to do business with, or on, is not the doing of that business by the former. Transactions such as the American Bell Telephone Company has had with the licensee corporations of Ohio, with its place of business in Boston and not elsewhere, are not the carrying on by it of business

in Ohio, nor are such licensee corporations its managing agents."

This doctrine was approved, and the above passage quoted, in People v. American Bell Telephone Co., 22 N. E. 1057, 1061, a decision of the New York Court of Appeals.

In Waycross Air Line Company v. Offerman R. Co., 35 S. E. 275, the court said:

"One person may own all of the stock of a corporation and still such individual shareholder and the corporation would in law be two separate and distinct persons." (Citing authorities.)

"One corporation may own all of the stock in another corporation, but notwithstanding this, the two corporations would not become merged, but would remain separate and distinct persons." (Citing authorities.) "It would necessarily follow from the rulings in the cases cited that two corporations would not become merged into each other merely because the stock in each was owned by the same persons. Therefore the contract made by the Southern Pine Company was not the contract of the Offerman Company, even if the stockholders in each were identical."

The cases cited are:

Manufacturing Co. v. White, 42 Ga. 148;
Exchange Bank of Macon v. Macon Const. Co., 25 S. E. 326;
Sparks v. Dunbar, 120 Ga. 129; 29 S. E. 295.

In Smith v. Ferries & C. H. Ry. Co., 51 Pac. 710, the dealings between two railroad corporations were in-

volved and called in question. And we call attention to what was said in that case.

51 Pac. 717.

We further cite on the same propositions:

Richmond Constr. Co. v. Richmond R. Co., 68 Fed. 105,

which case is approved in

United Mines v. Hatcher, 79 Fed. 517, 519.

The question is fully discussed in

Exchange Bank of Macon v. Macon Const. Co. (Ga.) 25 S. E. 326.

Corporations organized by the same individuals for the same object are not identical.

White v. Pecos Land Co., 45 S. W. 209;
Fitzgerald v. Missouri Pac. R. Co., 45 Fed. 812;
Williamson v. N. J. R. Co., 28 N. J. Eq. 277;
National Water Co. v. Kansas City, 78 Fed. 428;
Lange v. Burke, 69 Ark. 85;
Farm Etc. Co. v. Alta Co., 65 Pac. 22;
Atchison R. Co. v. Cochran, 43 Kans. 225;
East St. Louis R. Co. v. Jarvis, 92 Fed. 735;
Watson v. Bonfils, 116 Fed. 157;
Alabama Etc. Co. v. Chattanooga Co., 37 S. W. 1004;
Fisher v. Adams, 63 Fed. 674;
Cook on Corporations, 5th ed., pp. 1540-1541,

and the cases cited.

These cases treat of every phase in which this question has arisen. And the grounds upon which this point was ruled against us in the court below are not tenable.

IV-A.

The court erred in deciding that the suit could be maintained against this defendant as a joint tort-feasor.

The rule to which the court here refers is, we submit, a rule governing actions at law but not suits in equity. It is true that for a wrong done by several joint tort-feasors the person injured may bring an action against any one or more or all of them where the action is to recover damages for the wrong done. But this does not obviate the rule of which we have just been speaking, that in courts of equity it is necessary to make all persons parties whose presence is necessary to the complete determination of the cause and who may be bound by the judgment to the extent that the decree may be obeyed without danger of molestation from other parties who have an interest in the same matter.

The converse of this is also true. That is, where several wrongdoers, not acting in concert, are occasioning damage, the person injured may, in many instances at least, maintain a suit to enjoin them all, but he could not bring a joint action against them to recover the damages.

Foreman v. Boyle, 88 Cal. 290;
Churchill v. Lauer, 84 Cal. 233.

The foregoing discussion covers all of the grounds upon which the court in its opinion based the decision that neither these water companies nor the Mexican company was a necessary party to this suit in order to grant the injunction.

See Opinion, Transcript Vol. 1, page 128.

It is submitted that the decision cannot be sustained upon any of these grounds and that even though granting an injunction may have been proper in the case, the court erred in granting it in a suit against the California Development Company alone.

V.

The court erred in deciding that if when the suit was brought there were grounds for injunction, such grounds had not been removed by the destruction of complainant's works and by the closing of defendant's intakes.

It will be noticed that the court places this upon the proposition that the complainant is entitled to have its free-hold protected without regard to the amount of damage threatened. Otherwise the overflow sought to be abated might by a prescription ripen into a servitude upon the land. And further that the present safeguards against overflows might be temporary, while the complainant's remedial rights, if it has any, include permanent relief.

Conclusions of Court, Trans. Vol. I, p. 129, 3rd Paragraph.

Of course the court is not here considering the question of what would be the effect upon the right to any sort of relief, if the evidence showed that the plaintiff was never entitled to an injunction. But the court is proceeding upon the theory that notwithstanding the purposes of an injunction may have been in every other respect made unnecessary subsequent to the commence-

ment of the action, the court could still go on and grant an injunction for the protection of the free-hold. This is the question presented by the specification and we submit that upon this proposition, as every other, there is no universal rule of the character decided by the court, and whether that be correct or not must depend upon the circumstances of the different cases as they arise.

We call attention now briefly to the facts in this case, undisputed, as nearly all of them are, which, as it seems to us, show that the court erred in this particular. In the first place the evidence proves conclusively that the destruction of the property of the plaintiff was not wrought by the voluntary diversions made by the California Development Company, but on the other hand the same cataclysm which destroyed the property of the plaintiff was destructive of the property of the California Development Company. No matter whether the destruction was due originally to the negligence of defendant or not, still we say that the final result was not due to any voluntary act on the part of the California Development Company; but in truth, it exhausted its own resources in the attempt to shut the water out of the canal;—in other words, to do the very thing which the plaintiff was seeking to compel it to do, and finally accomplished it through the aid of others and large expenditures of money.

Trans. Vol. III, p. 1270 *et seq.*, Vol. IV, pp. 1611, 1612, 1617, 1618 *et seq.*

So far, then, as the command to build headworks by which the water was to be controlled, it was an accom-

plished fact nearly a year before the decree was given.

Trans. Vol. IV, page 1617.

So far as the lake was concerned, it was an accomplished fact and no injunction could affect it. The settlers in the Imperial Valley were numerous, the demands for water great, their properties exceedingly valuable and they would perish without the water. The lake covered an enormous area and extended a distance of forty-five miles southerly from the plaintiff's works, which were already destroyed. From an irrigating system so great as this, indeed from any irrigating system, some waste is necessary, and in one so enormous as this the waste must be quite considerable. The plaintiff's lands, as we have said, and its salt works, were overwhelmed with the flood and the waters are standing there to this day, seventy or eighty feet in depth in the deepest place. Enormous damage might accrue to the Imperial Valley, its land owners and cultivators of the soil and the towns and the various industries that have grown up therein. The court, in granting compensatory relief, had taken the estimate of the salt crust in the lands of the plaintiff, made by the complainant's own witnesses. It had been testified to be 1,500,000 tons. It was valued by the same witnesses at 25 cents a ton.

Testimony of Henton, Tr. Vol. II, pp. 625, 628;
Testimony of Sherman, Tr. II, p. 471.

This is one of the items allowed by the court in the summary of damages and is included under that title, "Salt Crust Destroyed $375,000."

That this land never had any value except for the salt

and the defendant was charged with that salt as a total loss and all the value which the land possessed was compensated for by that one item.

Trans. Vol. II, page 470 *et seq.*

The only other property that the plaintiff had upon the lands claimed by it was its buildings and machinery, its plant generally, including the railroad. For all this, except the railroad, the court awarded damages as for a total loss. Indeed, they had been completely destroyed and their value as determined by the court was allowed as a part of this compensatory relief.

We have then this conceded condition existing at the time this decree was given. The plaintiff's property was utterly destroyed. It had nothing left except merely the bare land which had been a salt bed and was valueless for any other purpose. It was awarded damages for that loss. On the other hand, the Imperial Valley was a flourishing settlement with more than 100,000 acres in cultivation absolutely dependent for its value upon the waters of the Colorado river and through this irrigation system of works. It had its towns, five in number.

Trans. Map. Vol. VII, page 2408.

And these and everything that pertained to municipal life was also dependent upon the waters of the Colorado river. The value of these properties amounted probably to more than ten millions of dollars and their very existence depended upon this water. Without it the destruction of the property of the Imperial Valley would be as complete from drouth as the plaintiff's property

was by the flood. The defendant had, at enormous cost, not only constructed the controlling headworks in the intake, but had been compelled, for the protection of the country against overflow, to build about sixteen miles of levee on the west bank of the Colorado river, all of which was completed before the trial ended.

Trans. Vol. IV, page 1630-1631.

The office of a writ of injunction, as its name implies, is a preventive, not a remedial one; it is to restrain the wrongdoer, not to punish him after the wrong has been done, or to compel him to undo it.

Stewart v. Superior Court, 100 Cal. 543, 546-547.

Preliminary injunctions will not be retained where it appears that the acts, the performance of which is sought to be restrained, have been performed before the order for the injunction is made or served.

Gardner v. Strover, 81 Cal. 148, 151;

Clark v. Willett, 35 Cal. 534, 547-549;

Pensacola, etc. R. Co. v. Spratt, 91 Am. Dec. 747, 750;

McCurdy v. City of Lawrence, 57 Pac. 1057.

In that case, among other things, the court said:

"At the final hearing of the case in the District Court it appears that all the things sought to be prevented by said action had actually been done. As said by the Supreme Court in City of Alma v. Loehr, 23 Kansas, 368, 22 Pac. 424; the exclusive function of a writ of injunc-

tion is to afford only preventive relief. It is powerless to correct wrongs or injuries already committed."

Street Ry. Co. of East Saginaw v. Wildeman, 25 Northwestern, 193, 194;

Carlin v. Wolf, 51 S. W. 679;

Same case, 55 S. W. 444;

Barney v. City of New York, 82 N. Y. Sup. 124;

U. S. v. La Compagnie Francaise Des Cables Telegraphiques, *et al.*, 77 Fed. 495, 496;

Baring, *et al.* v. Erdman, *et al.*, 2nd Fed. Cas., p. 784, Case No. 981, p. 790;

Cecil National Bank v. Thurber, 59 Fed. 913, 915.

A second principle which we here invoke is that injunctions will not be issued where the effect would be to defeat great enterprises or business in which a large number of people are interested.

McCarthy *et al.* v. Bunker Hill & Sullivan Min. & Coal Co., 147 Fed. 981, 984-985.

The doctrine of this case applies here. This court knows judicially that no system of irrigation was ever so complete that there was absolutely no waste of water, but here the water must flow from sixty to ninety miles before it reaches the point of use and it requires two or three days for it to reach the point of delivery into these canals from the place where it is diverted. Under such circumstances the immediate control is impossible and even after the control is exerted it is still two or three days before the water has passed away. In this decree the

defendant is enjoined from diverting from the Colorado river *any of the waters thereof* in excess of the substantial needs of the people dependent upon the canal described in complainant's bill of complaint for water supplied for domestic and irrigation uses and purposes and such other lawful purposes as the same may be applied to.

Tr. Vol. I, page 136.

Second, that the said water so diverted, whatever may be the amount, shall be so controlled and used that the same shall not flow upon the lands of the complainant described in the bill, etc.

Id.

Third, that the defendant be required to regulate the flow of any water that may be diverted by it so that there shall be *no waste water* flowing therefrom as the result of such diversion upon or over the lands of complainant above described.

Fourth, that defendant be restrained from turning out of its canals any waste water at any point where the same will naturally flow upon or over the lands of complainant or flow into the lake now covering the Salton Sink and thereby substantially increase the amount of water therein, or maintain the amount of water therein or prevent the decrease thereof by natural causes and that a writ of injunction be issued in accordance therewith.

Tr. Vol. I, pp. 136-137.

This injunction may doubtless be construed, and we think equally doubtless should be construed, in such

manner as not materially to interfere with the administration of the system. The learned judge of the Circuit Court has recently given an interpretation which we think is manifestly a correct interpretation of the injunction, yet nevertheless the presence of the injunction compels the administration of a great and growing system of water distribution under the menace of proceedings for a contempt. And it is plain that acts not amounting to carelessness in any employe of the company might nevertheless result in what the court would adjudge to be a violation of that injunction.

It will be noted that all water that is turned into the intake from the Colorado river at all naturally flows towards this Salton Sink. The difference in elevation between the point of the intake and the lowest depths of the Salton Basin will perhaps amount to 300 feet. No use can be made of the water so that it would not naturally flow towards this Salton Sink, and if enough of it, it would reach there. According to the estimate made at the trial of this cause, it will take at least ten years for that water to disappear by evaporation;

Tr. Vol. III, page 1144.

And no probability that it will evaporate in that time, for the lake is now nearly eighty feet in depth and covers an area of about 460 square miles.

While this latter fact does not appear in the testimony, yet it does appear as the government estimate of the area as made a few months ago, and of which we suppose this court will take judicial notice. The settlement of the Imperial Valley, as other lands of the United States, has been invited by the government of the

United States and the policy and the interest of both the United States and state governments are concerned in the maintenance of this settlement and in the encouragement of the still further extension of that settlement and of the cultivation of the soil thereof.

Of course, it is true that there is, on the other hand, the ownership by the complainant of certain lands and it holds that title in fee simple, and it is property, and though it be not of the value of a farthing, it is a property right and not unworthy of consideration. Yet the point here is that a complete and adequate remedy lies at law, and upon the question of an issuance of an injunction the mere existence of a title to property does not determine the question, but courts are influenced by the enormous damage that may accrue on the one hand and the insignificant and mere technical injury resulting on the other.

The granting of injunctions, whether permanent or preliminary, are, to a very considerable extent, matters of discretion, and that discretion should be exercised in favor of the party most likely to be injured or in favor of him who would suffer the greatest injury.

Page v. Aikens, 112 Cal., 401.

And the proof must be clear and convincing and the damage real and substantial.

Yarwood v. Michaud, 132 Cal., 204;
Fisher v. Feige, 137 Cal., 39;
Coleman v. Le Franc, 137 Cal., 214;
Real del Monte, etc. Mining Co. v. The Pond etc. Min. Co., 23 Cal., 83, 85.

It is submitted that upon these principles, even if the right to an injunction existed at the commencement of the action, it ought to have been denied on the final hearing. Though, as above stated, the learned judge of the Circuit Court has given such reasonable construction to the injunctive part of the decree as does, to a very considerable extent, obviate the objections to it, yet nevertheless it does not wholly relieve the appellant from the menace of contempt proceedings day by day in attempting to comply with its contract for the delivery of water and in the administration of its system, furthermore, the appellee has contended with great earnestness that the construction given is not the correct construction.

VI.

The court erred in deciding that the complainant was entitled to have its free-hold protected under the evidence in this case without regard to the amount of damage threatened.

This proposition decided by the court does not require a separate treatment, but we call attention of the court to certain thoughts that are necessarily involved in the court's expression of opinion upon that proposition. The language is this:

"Complainant is entitled to have its freehold protected without regard to the amount of the damage threatened. Otherwise the overflow sought to be abated might, by prescription, ripen into a servitude upon the land."

Tr. Vol. I, page 129.

First, if complete compensation is given for the full value of the land, there is no reason why the right should not accrue upon the payment of those damages. In other words, no reason why the judgment, coupled with satisfaction, should not operate as a condemnation of the property.

If an injury to the land is temporary the measure of recovery is the depreciation in the rental value of the land from the time of the injury.

Crab Tree Coal M. Co. v. Hamby's Admrs., 90 S. W. 226.

In an action for damages from overflow the rental and market value prior to the overflow may be shown.

Central of Georgia R. Co., v. Keyton, 41 So. 918.

Injury to land is considered as permanent when it is a continual one; when it is done at once by the unlawful act and negligent omission from which the loss results, without repetition of the act, there being but one act or one damage, though the latter may be composed of several items.

Masp v. Sapp, 55 S. E. 350.

In Hargreaves v. Kimberly, 53 Am. Rep. 121, the court, in the course of the opinion, said, among other things:

"In Thayer v. Brooks, 17 O. 489 * * * the action was for nuisance in diverting the water from the mill of the defendant in error and the court held that the rule of damages in an action for nuisance is the injury actually sustained at the commencement of the suit. In Blunt v. McCormick the court said: 'The rule

of damages laid down by the court was erroneous. In this action the plaintiff could only recover for injuries actually sustained before suit was brought and not for supposed prospective damages.' "

59 Am. Rep., page 122.

In a note to this case it is said that the most careful review ever made of this doctrine was by the New York Court of Appeals, Uline v. N. Y. Central R. R. Co., 4th N. E., 536. It was a case of a railroad crossing a street and raising the grade of the plaintiff's land. In the notes there are liberal extracts from the opinion in that case, and among other things, it is said, after saying that the right to recover damages existed:

"The question, however, still remains, what damages? Are her damages upon the assumption that the nuisance was to be permanent or only such damages as she sustained up to the commencement of the action? We have here for consideration an important principle of law which has to be frequently applied and which ought to be well known and thoroughly settled. There never has been in this state, before this case, the least doubt expressed in any judicial decision, so far as I can discover, that the plaintiff in such a case is entitled to recover damages only up to the commencement of the action. That such is the rule is as well settled here as any rule of law can be by repeated and uniform decisions of the courts; and it is the prevailing doctrine everywhere."

53 Am. Rep. 123-124.

In Troy v. Cheshire R. Co., 55 Am. Dec., 177, a suit for obstructing the highway, the court said:

"It is evident that a recovery in this action is a bar to any future action for this cause. In cases of nuisance the injury is of two kinds: 1. The direct injury caused by the act complained of, and; 2. The injury which may be afterwards occasioned by the unauthorized continuance of that cause. The declaration, in this case, alleges injury from the first construction of the railroad, and from its continuance to the date of the writ. The plaintiff can, in no event, recover for any cause of action not included in his writ; and on this ground, he can recover for no damage not sustained when his action is commenced. For any future damage he may recover in an action based upon a continuance of the injurious cause; and in such action it would be no answer to say that the damage now claimed has been recovered in a former suit because the writ in that case warrants a recovery only for damages sustained previous to its date. The principle for which the defendants contend is sound, and the only question which can arise here is as to the application of that principle. The damage done at the date of the writ is to be compensated, and that only. If that damage consists in the exposing of the party to expenditures of money, the test is not the time when those expenditures are made, for they may be paid at once or their payment delayed without, in any way, affecting the rights of the parties. The question is not, —When was the money paid—whether before or after suit; but was the liability to those expenditures occasioned by the acts complained of in the writ? Or was it by the continuance of the same acts or of the state of things produced by those acts, after the action was

brought? If they are the result and consequence of the wrongful acts complained of, they are to be recovered in that action. If they result, not from the wrongful acts, but from the wrongful continuance of the state of facts produced by those acts, they form the basis of a new action. There may, of course, be cases where it may be difficult to draw the line, but, it is apprehended, they will not be numerous. Wherever the nuisance is of such a character that its continuance is necessarily an injury and where it is of a permanent character, that will continue without change from any cause but human labor, there the damage is an original damage and may be at once fully compensated, since the injured person has no means to compel the individual doing wrong to apply the labor necessary to remove the cause of injury, and can only cause it to be done, if at all, by the expenditure of his own means."

55 Am. Dec., pp. 186-188.

In the note in this case the court did not limit the damages to the date of the writ, and we say that it was not limited to the time of trial, but the case was treated as one of permanent nuisance, and damages given as for a total loss of the property; the court refused the item of "loss of business." Why? Because the court had taken their estimate of the whole amount of the property upon which this business was to be done and had taken their estimate of the value of it in that natural state, and had awarded them the whole sum thus determined. In other words, the whole value of the business was transacted and the profit of it decreed to the plaintiff. And in view of the fact that the plaintiff's land is worth

absolutely nothing, never having had any value except for the salt, it is submitted that an injunction ought not to have been given in this case, if the judgment of damages is correct in principle. The general rule is that damages are only recoverable up to the time of the commencement of the action.

Stincke *et al.* v. Bently *et al.*, 34 N. E. 97, 98-99;
Henry v. Ohio River Co., 21 S. E. 863, 866, 869;
Ready v. Mo. Ry. Co., 72 S. W. 142.

The same principle is decided and the court in its opinion, among other things, said:

"In this class of nuisances, where the cause of the injury may at any time cease by act of the party or intervention of the court, the rule of damage is not the whole difference in the value of the estate just prior and just after."

See page 143;

The Redemptorist v. Wenig, 29 Atl. 667, 668.

There it was said, among other things, that the rule allowing one to recover damages, past and future, is based upon the theory that the injury will be permanent.

Fossum v. Chicago M. & St. P. Ry. Co., 82 N. W. 979,

is strongly illustrative of the principles for which we here contend. There the railroad company had constructed a culvert in lieu of one formerly constructed and gave as the reason for it that the culvert, where previously located, was in such a place as to render the roadbed unsafe, and the court said if that were true, and it did render the operation of the railroad hazardous and it was

moved to the place where it then was for that reason and did render the use of the railroad property less dangerous than it was before then it was an injury of a permanent character, and the rule of damage is the depreciation or diminution of the value of the plaintiff's farm in consequence of it, and it is in this view that they regarded the evidence competent and material. The principle here is obvious. Having been charged with the difference in the value of the plaintiff's land, occasioned by the construction of this culvert it necessarily meant that the railroad could go on using the culvert. In other words, it was practically a condemnation of the property for that purpose. See also,

Rosenthal v. Taylor B. & H. Ry. Co., 15 S. W. 268.

We submit that it was error to give damages practically upon the theory that the plaintiff's free-hold was destroyed or permanently occupied by this nuisance and then enjoin the nuisance.

VII.

The court erred in deciding that the evidence did not show such resulting damage to the settlers in the Imperial country from the injunction as would justify its refusal if complainant were otherwise entitled to it.

This we need not discuss further. It may be admitted that under the operation of the injunction given, if construed to mean that the defendant may do whatever is necessary to supply the settlers of the valley with water

for all lawful purposes, it is possible to administer the system without any very frequent deviations from the meaning of the injunction. But accidents do arise in the operation of all systems and especially one of such magnitude as that of the defendant. And for many other reasons, as we have said before, the injunction is always a menace and the danger of proceedings for contempt very considerable, and in this case, unnecessary. Just what the damage to settlers might be, it would, of course, be impossible to determine since all the contingencies and vicissitudes attending the operation of this system cannot be foreseen, much less proven satisfactorily.

VIII.

The court erred in deciding that the waters which overflowed the complainant's land and destroyed its property were largely, if not entirely, the waters diverted from the Colorado river through defendant's intake.

One feature which might be properly included or involved in the decision of this proposition, namely, whether this injury occurred through the negligence of the defendant, we shall not here discuss, and have stated this specific error as one relied upon, for the reason that the word "diverted" does, in its general meaning, and especially as applied to such a subject, imply or include within it the idea of some active interference by the defendant in taking the waters of the Colorado river from their natural course and conveying them to the Imperial Valley.

The fact which we here call attention to is that when we come to the consideration of the evidence for other purposes, it will be seen that in so far as this may include the active interference with the waters of the Colorado river by the defendant, the decision is not correct.

The Alamo water course, made by ancient overflows, ante-dating all artificial works of any kind, was the result of overflows of the banks of the Colorado river through various depressions, greater or less, and which, making their way along the lines of gravity, the waters of these various overflowed places came together and from their confluence had made a wider water course, and which was known as the Alamo river. This Alamo river or wash, as we have before stated, constituted forty miles or more of the defendant's canal, but the defendant's canal had no more to do with the diversion of the waters from the Colorado river in times of overflow than had these natural depressions, nor was the effect any different, and, as we have said before, what the defendant was really engaged in when these floods were sweeping into the Imperial Valley, was in giving its utmost efforts to prevent it from flowing into its intake or overflowing the banks at all.

IX.

The court erred in deciding that defendant was negligent in not selecting proper places for the intakes and in not providing suitable headgates to control the flow of water through the intakes.

The principal witness for the complainant in this case was Mr. Duryea, Jr. His co-worker was Mr. Sherman. The California Development Company had made three intakes, one of which was made in the year 1900 and the beginning of 1901, and was the upper of the three; the second was made later and is the middle intake, and lower down the river; the third, in the fall of 1904, in October, and is the lower intake.

The first was about *1200 feet* above the Mexican boundary. The second and third lower down and below the boundary.

Duryea, Tr. Vol. I, page 302;
Rockwood, Tr. Vol. III, pages 1161 and 1162.

These intakes were all denounced by Duryea as having been made in improper places. The lower especially, one which admitted of carrying the water into Imperial Valley much quicker because more easily constructed, but unfitted by reason of the danger which threatened the Imperial Valley, or the plaintiff's works on account of it. In his mind the proper place was at a certain rocky point which was above all three of these intakes, and where the banks of the Colorado river, on the west side, presented a more formidable barrier to the water and a place where proper works controlling it might

more easily have been constructed, and the control of the water better assured.

Tr. Vol. I, pages 307-308.

His foresight in this particular instance was, to some extent, fortified by his hindsight, from the fact that ultimately the intake was cut in this rocky point and the successful turning of the water out by this intake no doubt had much to do with the determination in this cause. Mr. Duryea gave it as his opinion that the selection of these intakes, and each of them, was negligence, and for the reasons above stated.

Tr. Vol. I, pages 308 to 311 inc.

Sherman, of course, concurred.

It is respectfully submitted that the opinions of these gentlemen and the opinions of all other experts upon this subject were not admissible in evidence in this cause. An expert is not permitted to give an opinion upon the very point in the case to be decided. The question in this case was whether the defendant was negligent or not and the opinion of the expert was not competent upon that question. And especially, too, when it will be seen that all of the facts were before the court which the experts themselves knew, either personally or from hearsay, and from those facts the negligence was to be determined and though that negligence was in a sense a matter of opinion, yet it was the judicial opinion which was to determine it and not that of hydraulic engineers. And unless, from the facts which are established in this case, negligence is shown to exist, the opinion of these experts will

not make it exist, nor is their evidence competent for any such purpose.

Giraudi v. Elec. Imp. Co., 107 Cal. 120, 48 Am. St. 114;
Kerrigan v. Am. St. Ry. Co., 138 Cal. 506;
Hanley v. Cal. Bridge, etc., Co., 127 Cal. 232;
Lumans Golden Channel Min. Co., 140 Cal. 700.

We make the following quotation from Giraudi case, 48 Am. St. 118:

"The cases do undoubtedly hold that an expert cannot be asked whether a structure is a safe one, or whether certain methods are prudent, but all hold that facts may be elicited from the witnesses from which the conclusion unavoidably follows."

Now for the evidence upon this proposition. We have stated the general facts quite fully, and as we have said before, they are undisputed: The enormous area of desert lands between the point of diversion and the New Liverpool salt works; the arid climate; the absence of rains; indeed, every feature of the country most favorable to the disposition of large quantities of water between the Colorado river and the New Liverpool salt works. In addition to that, past experience; the overflows of the Colorado river from time immemorial; the fact that there never was but one flood which materially affected the Salton Basin at all, and that in 1891, and under circumstances which we shall hereafter explain more particularly; the actual experiences of the defendant with these intakes.

At the first a headgate to control the waters was

placed. It soon became useless from the silting and it became necessary to cut a by-pass around this gate in order to get water through for the use of the settlers.

Rockwood, Tr. Vol. III, pages 1181, 1185 to 1188, 1190, 1194;
Sexsmith, Vol. III, page 914.

The intake itself became useless, which was the reason for cutting the second. The experience with the second was exactly the same.

Rockwood, Tr. Vol. III, page 1194;
Sexsmith, Tr. Vol. III, page 918, 919.

The third was cut, and in that also dredging had been necessary to clear away the silt before the floods came. As we have said before, all experience was that the trouble they were to have was to get water through the intakes and not to keep it out. In all previous experience, whenever they had occasion to turn the water out, they had done so without difficulty.

Follett, Tr. Vol. IV, p. 1517;
Rockwood, Tr. Vol. III, pages 1190, 1241;
Sexsmith, Tr. Vol. III, pages 915-917 incl.

Under the records of previous overflows and the experience with these intakes and the canal, it is submitted that the selection of them was not negligence.

Now, the fact, even if it were a fact, that the rocky point were a more suitable place for various reasons, that does not of itself make it negligence to select another. But now, for the purposes of safety, what advantage, pray, was the rocky point, and an intake at that place and headworks to control the flow of the water?

The rocky point has been there from the foundations of the world, so far as we know. It has always stood as an impervious barrier to the flow of the waters of the Colorado river and its elevation prevented the overflow on the surface. In other words, the rocky point itself was performing all the functions of the rocky point plus an intake with solid cement headworks to control the water. In spite of this fact, the Colorado river has overflowed its western banks along for miles below that rocky point, notwithstanding the presence of the rocky point. Can it be pretended that the presence of an intake with solid headworks would have had any tendency whatever to have prevented the waters of the Colorado river from overflowing below? It will be said that since the intake was constructed there the defendant has prevented the water from overflowing the country. The reasons are as plenty as blackberries.

(1) The floods ceased to come one on top of another as they had for two years before.

(2) The overflow of the river did not cease until the defendant had leveed its banks for eleven or twelve miles; without that levee the rocky point intake and the headgates would not and could not have had any effect whatever towards preventing the overflow.

It has been claimed that that which constituted principally the negligence of the defendant lay in the fact that by allowing the waters to flow in the intakes, the Alamo canal was washed out and the intakes were washed out, until the whole of the Colorado river at one time went through the Alamo river. How would that have been prevented by an intake at the rocky point

and the headworks there? The Alamo river, the New river, and divers other streams, as will appear in the record in this cause, had been made by just such floods of the Colorado river when there was no canal. The Alamo river had itself been cut to pieces prior to the time that there were any intakes. In the flood of 1891, the gentlemen who went on an exploration for the Southern Pacific Company, found this Alamo channel or water course, one day of one dimension and in a short time afterwards increased in its size nearly or quite four times.

E. L. Swaine, Tr. Vol. III, pages 874, 875 *et seq.*

It had cut out, both deepened and widened, in the meantime. Now, the cause of the 1891 flood was similar to those of 1905 and 1906, differing only in the degree. In the flood of 1891, the waters, in February, attained a higher point on the gauge than it did at any time in 1905 or 1906, or any other time.

In February, 1891, the Yuma gauge attained a height of 32 feet.

Tr. Vol. 1, page 163.

The waters which poured over in the flood of February were impounded by sand dunes and retained until the floods came later. In March the Yuma gauge attained a height of 23 feet.

Tr. Vol. I, page 163.

In April, 20 feet; in May, 25 feet; in June, 23; in July, 22.

Now, when the floods of the flood season came, the flood waters, united with the impounded lake, cut

through the sand banks and turned practically the contents of both floods into the Salton Sink at once. The bank of the Colorado river has been reported by the United States government to have been increasing at the rate of about an inch a year.

Follett, Tr. Vol. IV, page 1473;
Duryea, Tr. Vol. V, pp. 1941 and 1942.

The gauge height which marked the point of overflow in 1891 was stated by Mr. Duryea and Sherman to be 122 feet, or 22 feet on the Yuma gauge.

Tr. Vol. V, page 1941.

The same is taken as the height of overflow of 1891, by the engineers of the defendant, particularly Hawgood and Rockwood.

Rockwood, Tr. Vol. IV, pages 1548-9, 1551 to 1557;
Hawgood, Tr. Vol. III, pages 1120 and 1121 and 1122 and 1128.

Estimating the increase according to the results of the government observation, it was deemed in 1904, 13 inches, making the Yuma gauge height, in 1904, that marked the overflow, substantially 123.

Tr. Vol. III, pages 1120 *et seq.;*
Tr. Vol. IV, pages 1551 to 1557 and 1599 *et seq.;*
H. T. Corey, Tr. Vol. IV, pages 1630 for 1906 and 1907.

The floods which caused the havoc that produced this controversy began in January, 1904. It was shown, too, that when it is said that 22 in 1891 and 23 in 1905,

marked the point of overflow, it was meant the point of general overflow, and that in fact, the water was flowing over the west bank in many places of depressions before the gauge height reached 22 in one of those years or 23 in the other.

Hawgood's testimony, Tr. Vol. III, page 1151; Corey, Vol. IV, pages 1704, 5 and 6.

In Vol. VI of the transcript, page 2139, there will be found a complete record of the gauge heights in Yuma for the entire year of 1891. We have said that the greatest height which it attained in that month was 32 feet on the 27th of February. We think that somewhere it was testified that the 32 was a mistake and that it should be 33, but it will be seen from that table that the water ran from 28 on the 23rd; 25 on the 24th and 25th; 27 on the 26th to 32 or 3 on the 27th; 28 on the 28th; and that it remained above overflow point on March 1st and 2nd. In the same volume the gauge heights are given from 1891 to and including 1902, pages 2199-2210.

Then we have the reports of 1904 and 1905, in the printed volumes, to which we shall refer hereafter, and for the first 11 months of the year 1906, in Vol. VI of the evidence between pages 2267 and 2269, marked on the back 2268.

These tables we shall have to refer to again and pass them now, remarking only that, looking at those gauge heights alone, it will appear that if the original intake had been cut at the rocky point and an immovable headgate constructed therein, the result would not have been any different in any respect, in the years 1905 and 1906, from what it was.

Furthermore, the California Development Company had no reason to anticipate any such results as occurred from the construction of those intakes, and that it is not negligence to do anything where there is no reason to anticipate any such results as follow. The authorities upon this proposition we shall cite under another head.

X.

The court erred in deciding that the defendant's said negligence was the direct and proximate cause of the overflow of complainant's lands and the resulting loss of its property.

We shall not, under this head, enter into any extended discussion of this question, since the whole matter will more properly be considered under another. If what we say under the last point is correct, then the court did err in the matter just referred to. The Colorado river did overflow every year and it submerged the plaintiff's property on the occasion here referred to because there were such a succession of floods coming one upon the heels of another, in the years 1905 and 1906, as never occurred before in the world's history, so far as known, and that the quantity of water discharged by those floods, when compared with that of 1891, would have made an overflow of eight or ten times the water that poured into the Salton Sink in 1891, and we know that the Salton Sink attained an area that year of about 360 square miles.

Testimony of George W. Durbrow, Supt. of complainant company, Tr. Vol. II, page 642.

And was of a depth, in its deepest place, of about five feet, and that, measured by the due proportion, it is susceptible of a mathematical demonstration that the floods of 1904, '5 and '6, should have made a lake of anywhere from forty to sixty feet in depth in its deepest place, and would have submerged and utterly destroyed every particle of the plaintiff's property, if there had not been an intake of any kind on the Colorado river.

On the computation of the proportionate amount see testimony of Hawgood, Vol. III, pages 1120 *et seq.;* Corey, Vol. X, pages 170 *et seq.*; Follett, Vol. IV, pp. 1473 *et seq.;* J. D. Schuyler, Vol. III, pp. 1289 and 1290; C. R. Rockwood, Vol. III, pp. 1230 *et seq.*

These figures were gone over by Mr. Duryea, who testified that there was no objection to be made to the computation. The only doubt that he expressed was that he thought the overflow point was put too low, but he agreed to the fact that the increase of elevation on the bank of the Colorado river was about an inch a year.

Tr. Vol. V, pages 1853, 1857, 1935, 1941 to 1943 and 1964.

And he admitted that it would make no practical difference at what point the overflow really took place in 1891 and 1905, if you maintain the proportional height. In other words, if the point of overflow in 1891 was 24 feet instead of 22, still the proportional amount of flood water would be practically the same if you take 25 for 1904. However, it is submitted that the testimony is overwhelming that the overflow points assumed in this case are practically correct because there were many years in which there would have been no overflow at all,

or at least none worth speaking of, if we were to suppose these greater elevations to control, when we know that the overflow did take place.

XI.

The court erred in deciding that the floods of 1905 in the Colorado river would not have overflowed the banks of the river and submerged complainant's lands if the defendant's intakes had not existed.

We pass this point for the present, upon the proposition already presented.

XII & XIII.

The court erred in deciding that the complainant was entitled to the injunction in this cause and in deciding that the complainant was entitled to the compensatory relief sued for.

These questions have already been, to a considerable extent, discussed, and we shall present no further argument at this moment in support thereof.

XIV.

The court erred in granting the injunction in this cause in the absence of the Mexican company and the said several Imperial water companies and in decreeing the injunction in this action.

The principal point here involved is that these water companies and the Mexican company were necessary parties to the granting of such relief and it is submitted that under the facts proven in this cause, having refer-

ence especially to the contracts, that the court did err in this respect. These companies are not only independent companies, but the defendant company delivers water into the canals of the various water companies at different places, and from that moment has no control whatever over such canals, but from that time they are entirely under the control of the Imperial water companies and those water companies are not under the control of the defendant. Hence, if the defendant company delivers water to those companies in proper quantities, and no more than is necessary for use, some negligence or some action or inaction on the part of those companies may result in that water going to waste and flowing into the Salton Lake, a matter over which the defendant has no control, and for which it ought not to be punished for a contempt, and it is submitted that the relation of the parties are such that those companies would not be amenable to the process of contempt in this suit.

XV.

The court erred in granting the judgment for damages in this cause because the evidence is insufficient to prove any damage to the complainant from any negligence of the defendant or to justify a judgment against the defendant for any damages.

We shall cite the portions of the evidence relied upon under this point further along.

XVI.

The court erred in deciding that the flooding of the Salton sink, in the years 1904 and 1905 and 1906 and the destruction of the complainant's property, was occasioned by the fault of the California Development company, or by any negligence of said company.

This proposition we shall consider with the seventeenth specification, namely, that the destruction was wrought by the act of God.

The seventeenth specification is this: The court erred in deciding that the flooding of the Salton Basin with water and the destruction of the complainant's property occurred through the negligence of the defendant and was not the act of God.

In discussing this question we shall consider two different portions of the time. In the fall of 1904, and after the construction of the lower intake and after the flood season was over, the water began to appear in the Salton Sink. Mr. Drury, whose testimony begins Vol. II, page 558, says that he thinks he first observed the waters accumulating in the Salton Sink in November, 1904, about the middle, and at that time it had not approached nearer to the mills than two or three miles, and possibly as much as four or five miles. That they began to be apprehensive of danger as soon as the water reached the place where they were working and that was sometime in December. They were working on section 22 and the water was then about three and a half miles from the mills and machinery. That he thinks the water rose thereafter about one-half an inch a day perpendicu-

larly, and later increased. He thinks that sometime in December they began to be a little afraid and built a levee around the mills. Can't tell just when the water reached this levee; thinks the levee was built in December and the water reached that levee shortly afterwards and thinks that they abandoned it on March 10th because the whole thing was swamped. That was in 1905; and he thinks that the water first overflowed into the buildings and machinery on March 5th, 1905.

Tr. Vol. II, pages 600-603.

Now, it does not appear that any damage had been done to the property of the plaintiff during the year 1904, nor very distinctly that any damage was done, except to the salt crust, prior to March, 1905. But Mr. Drury informs us that the salt crust is never dry; that the water is usually from the surface to one or two inches below the surface; that the salt crust varies in depth from nothing to 18 inches on section 22.

Tr. Vol. V, pages 1964-1966.

He admits that during his experience at the salt works they have sometimes been interfered with in their operations as concerns drying the salt by reason of rains.

Id. 1966.

Mr. Drury produces a copy of the notes kept by him of the various events occurring as the waters rose.

Vol. V, pages 1967-1968.

And then gives us the dates from those notes. They will be found

Tr. Vol. V, pages 1968-1970.

October 31, 1904, water appeared about 4 or 5 miles from Salton; November 1st, about 1 mile from end of salt company's track; November 7th, water coming with a rush on section 34; November 14th, water reached and covered all of the salt to a depth of 3 inches; 15th, planned levee to protect mill and piles of salt; 21st, water 4 inches from rails of the company's railroad on the marsh; December 5th, water driven back by strong wind, leaving the salt uncovered except for dirt, silt and lime; track badly damaged. December 8th, telegraphed for sacks to use in protecting levee; December 20th, levee nearly completed; December 28th, levee, as originally planned, completed; January 6th, 1905, parties left Salton but sent back for boat. January 9th, water reached point about 600 or 700 feet from the mill. January 10th, 1905, Dovers and Sherman returned to Salton. January 11th, water at main levee. January 14th, water coming up on levee; 15th, telegraphed to rush pump; 16th, commenced to move salt; 19th, pump arrived and being installed; 24th—he does not complete the answer; and on February 7th the levee badly damaged. March 5th, levee broke and much salt destroyed. And so on until finally the buildings were entirely destroyed.

Vol. V, pages 1968-1970.

Turning now to the reports of the stream measurements published by the United States for the calendar year 1904, being Water Supply and Irrigation Paper No. 134, we find there reports of the Yuma gauge height for that year, pages 21-24, and all collected together on page 25. Assuming 23 feet as the overflow point, it will be seen that that height was first attained on May 20th,

1904, and continued above that point continuously down to and including July 15th. It did not again attain that height until August 24th and 25th and did not attain that height again that year. Therefore, a general overflow probably did not take place after the 15th of July, except on the said two days of August, but the overflow point had continued for a long time; and now we call attention to this fact, that while the overflow point is not reached, the gauge does not fall below 22 until August 5th, and then it is 21.95; and on the 6th, 21.85, and then goes above the 22 and hovers around that point, reaching 23 the two days in August referred to, and continuing through September and October and the first part of November, either at or above the 20 mark all the time, with the exception of but four or five days.

Now, Hawgood has said that the 23 mark marks the general overflow, but that water is overflowing through the low places of the Colorado bank before it reaches the 23; even in the year 1905, one of enormous floods, the gauge does not mark a uniform height so great in August, September, October, November and December, as it did in 1904.

Now, Rockwood has testified that no amount of water, wasted from the canals of the defendant, could have occasioned the influx or gathering of the waters of the Salton Basin in the fall of 1904.

Tr. Vol. III, pages 1212, 1215, 1216.

Duryea testified that 500 cubic feet per second wasted upon this extensive area of porous land would never have brought about the overflow in the Salton Sink.

Tr. Vol. V, pages 1926 *et seq.*

And from the testimony of Rockwood it was shown that no such quantity had been diverted during those months by means of this canal.

Tr. Vol. III, page 1212.

Furthermore, this canal was constructed in October, 1904, and had to be dredged out in order to get water through it before the fall season was over.

Rockwood, Tr. Vol. III, pages 1200 and 1201;
Sexsmith, Vol. III, page 921.

It was shown, moreover, that the fall of 1904 and the winter of 1905, was one of unusual rainfalls in that section of the country.

Tr. Vol. III, pages 1220 *et seq.*

That the season was unusually cool and the atmosphere unusually humid.

It was testified by Mr. Durbrow that a cloudburst in the summer of 1891 raised the lake in the Salton Basin that year two feet in depth [Tr. Vol. III, page 643], and there were many rains in the fall of 1904 and the early part of 1905.

Tr. Vol. II, page 643.

If we turn now to the testimony of Duryea and Sherman, and perhaps others, it will be found that they give it as their opinion that the waters which accumulated in the Salton Basin in the fall of 1904, probably came through the defendant's canal, and they seem somewhat more positive that the water came from the Colorado river.

Tr. Vol. II, pages 437 *et seq.*, 497, 507.

But it will also be seen that neither of them ever took the trouble to follow up the waters in their examinations and to determine with any degree of certainty where those waters did come from. [Tr. Vol. II, pages 487 *et seq.*] They do not appear to have made any examinations of their own or inquiries of others in regard to the rainfall during that period.

Observe the discharge measurements in second feet of the Colorado river in 1904, Water Supply & Irrigation Paper No. 134, pages 21-24. The last column on these pages shows these discharge measurements and will show the vast difference between the ordinary flow of the river and its flow during the flood seasons. And see particularly, on pages 23 and 24, the discharges after the flood season up to October 25th. On page 25 will be found, under the head of Estimated Monthly Discharge of Colorado River at Yuma, Arizona, for 1904, a summary of the maximum, minimum, mean and total in acre feet.

It will be observed that in the bill in this case the complainant alleges the diversion from the Colorado river of large amounts of water during this fall. The plaintiff undoubtedly took this from the reports of the stream measurements in 1904, to which we have referred, and they have relied apparently upon the table on page 28 of that report and of the title "Discharge Measurements of Imperial Canal at Heading in Mexico, Four Miles Below the International Boundary Line, New Gauging Station." Note that this is at the heading in Mexico and four miles below the international boundary line. On page 29 an explanation is given of what was done for the purpose of determining the *waste*.

"In October," says this report, "a canal known as canal No. 6 was completed, which enters the valley west of Calexico, California, and a station was constructed at this canal in November and weekly discharge measurements are being made. A large quantity of waste water was discharging from the Imperial Valley *below all irrigated lands, into the Salton Basin.* To determine this waste, discharge measurements were made on New river at Brawley, on Alamo channel at Rockwood, and on canal No. 5 at Bernice."

Report 1904, page 29.

Now, the first discharge measurements are given of the Holt canal near Calexico and that report is made in second feet, pages 29 and 30, and it will be seen that the greatest amount of waste discharge at any one time was 62 second feet, and it varied between 27 and 62.

On page 31 is given the discharge measurements of Hemlock canal near Calexico, and which amount, as will be seen, to little or nothing, running from 1.8 second feet to 14.5, but being less than 10 except on three different days.

And on page 32, for the months of July, August, September, October, November and December, it will be seen that for those months the discharge measurement never amounts to 2 second feet.

The next is the discharge measurement of the Alamo canal and it will be seen that from July 24th to the end of the year it varied from a minimum of 36.5 to a maximum of 256 second feet.

Same Report, page 33.

Discharge measurements of Alamitos canal, during the same period, never exceeded 36 second feet, and varied from 8.2 to 36.

Same Report, page 35.

The discharge measurements from the Imperial canal, near Calexico, are given at page 37, but that is not below the lands of irrigation, and besides that, the maximum there is 717 and measures the total flow. The discharge measurements of the boundary canal near Calexico will be found at page 39 and amount to very little.

The points mentioned on page 29 as being below the irrigated lands, and which constitute the waste, will be found at page 40. These are the discharges at Brawley, Rockwood and Bernice, the three points named on page 29, and from which it will be seen that the waste never amounts to 500 second feet. The first measurements are not complete, as Bernice is not included; but at Brawley (New river), 208 second feet; at Rockwood (Alamo), 43. For the month of October, the 18th and 19th, the sum total of waste was 502 second feet. The next sum total at the three points, 498, and so on, never attaining 500 at any time, except in the month of October, and then but two second feet over.

This marks the real waste from all these canals during that period, for these are the points which lie below the irrigated lands, and according to Duryea's testimony, a constant flow of 500 second feet would not have accounted for the waters in the Salton Sink in 1904.

In Water Supply and Irrigation Paper No. 177, at page 24, is given the portion of the Colorado river diverted by Imperial canal during 1904. The discharge

measurements made at the Imperial canal headings during 1905.

Id. page 23.

The daily gauge height at Yuma for 1905, is given—

Id. pages 15-16.

Now, taking the month of January, it will be seen that the overflow point is reached the first time on the 18th of January.

Id. page 15.

The water then stands high from that on until in February, and on the 8th of February it attains the height of 27.2; the next day, 28.75; the 10th, 26.6; the 11th, 24.1; then it falls below 23, but keeps well up the mark until on the 19th it attains 22.65; 24.9 on the 20th; 25.75 on the 21st; 25.85 on the 22nd; 23.55 on the 23rd. But without repeating these measurements, we call attention to the flood of 1905, beginning on January 18th, and it was just one flood after another until the summer overflow came, and during the months of February, March, April, May, June and July, down to the 10th, it was almost constantly above the general flood point. And in November it began again on the 29th, and it continued so to the 4th day of December.

We have the first ten months' gauge heights for 1906—

Tr. Vol. VI, p. 2268, Defendant's Exhibit No. 28.

Here again we find that on the 15th of March of that year the waters attained a gauge height of 26.20; on the 16th, 27.53; 17th, 25.50; 18th, 23.20. Falls below

the flood mark till the 27th, when the gauge height was 22.10, and does not fall below it till the 7th of April. In the flood seasons of May and June, indeed from the 25th day of April, until the 5th day of July, it was never below the flood mark.

In the same Vol. VI, are the reports of the gauge heights from 1891 to 1902.

Vol. VI, pp. 2199-2210.

While the notes do not show it, apparently, we are positive that the printed reports for the year 1903, were used on the trial of this action and the gauge heights at Yuma are shown in the volume for 1903, Water Supply and Irrigation Paper No. 100, from pages 20 to 24. And then are brought together, independent of the discharge, pages 24 and 25.

In the report for the year 1905, page 17, is given the yearly maximum and minimum gauge heights at Yuma from 1878 to 1905, and this table will become important a little farther along.

We have referred the court here to these tables to the end that we may not have need to refer to them any further, except to the report on the page last referred to, and we submit that upon the evidence in the cause the court was not justified in finding that the waters which accumulated in the Salton Basin in the fall of 1904 and preceding the flood of January 18th, 1905, was caused by the negligence of the defendant, or that the waters which there accumulated came from the canals of the defendant company at all. The daily gauge height at Yuma was sufficient to account for the overflow of waters in low places on the west bank of the Colorado

river for a long period of time, and much of which might have made its way into the sink. The rainfall had much to do with the accumulation of those waters. It was shown that the cultivators of the soil, ordering water for a particular day, and that water being delivered to them, found themselves unable to use it because the rain had just occurred, and these things and the little evaporation that took place because of the state of the atmosphere, was the explanation of these things, or at least upon this state of the evidence the court was not justified in concluding that it was the fault of the defendant.

Now, if, as we say, the uncontradicted evidence shows an abnormally long continued height of waters in the Colorado river, during the latter part of the summer and fall of 1904, though just below the overflow point, the unusual quantities of rain that fell in the surrounding mountains, the abnormally low temperature and humid atmosphere, and all concurring in that fall, were things which the defendant had no reason to anticipate, and, as we shall show by the authorities hereafter, one is not guilty of negligence in not anticipating things which are so unlikely that he has no reason to expect them or to provide against them.

And we remark generally here that the evidence was not sufficient to prove that any damage had occurred to the plaintiff's property prior to the floods of 1905, or, if any, to give any sufficient data upon which to estimate the amount of damage.

Passing now to the next period, beginning with the floods of 1905, which began on the 18th day of January.

It is submitted that there is no conflict in the evidence concerning the period between the 18th day of January, 1905, and the beginning of the year 1907. There was never anything like it seen in the world. The oldest inhabitants, who had known it from forty to fifty years, or more, have testified that they never saw any such conditions before and that there never were any such. The gauge heights show that there was nothing like it ever in any season before. Nobody pretends that any such succession of floods and long continued floods, one after another, ever did occur.

We here cite the volumes and pages where the testimony upon these facts may be seen.

Testimony of men, including steam boat captains, who have lived and worked on that river for many years.

. Hall Hanlon, Vol. II, pages 853 *et seq.;* lived on the Colorado river for 55 years, page 853; remembers the flood of 1891, *id.*: Floods of 1904, 1905, 1906 unprecedented: "From the year 1854 until this time, neither I nor any man on earth has known a succession of floods of such magnitude as occurred in 1904, 1905, 1906." *Id.* page 855.

J. A. Mellon (steamboat captain), Tr. Vol. II, page 789.

Been engaged as steamboat captain on Colorado river since 1863, *id.* page 789:

"There has been three funny years down there. We have never had so much water below Yuma as we have in the last three years;" *id.* page 797; 1905 was the big flood; *id.* pages 799, 808, 809: "The floods just kept

coming one after the other. I have never seen such a condition since I have been there of the Gila coming up as it did that year, and last year and the present year: at no time during the whole time that I have been there. * * * If it did come up once a year that was all we would expect; but here it is coming up three times in a year one after the other. One don't pass by until there is another one right on its heels. By that I mean a flood.

"And such conditions as that I never have known in that section before and no person else. Mr. Hanlon has been there since 1854 and I warrant he has never seen anything like it. The Indians have not seen anything like it. I have asked them about it. The oldest Indian [*id.* pp. 812-813]. * * * Joseph S. Carter [Vol. 2, pp. 763, *et seq*]. Lived in that section for 20 years. Was there when the flood occurred in the Salton Sink in 1891. I went through to the Salton Sea in 1891. In June I think. Was with Mr. Harry Patton and a man by the name of Converse. Made the trip by boat [*id.* pp. 763-4] (describes trip made in that year, pp. 764 to 768 inc). Was there from 1860 to 1866 continuously. Saw the flood of 1862. We considered it a very large flood [*id.* p. 769]. Since 1891 and up to 1905 have observed the floods of the Colorado river constantly [*id.* p. 769]. None of the floods between 1891 and 1905 were as great as the flood of 1905. I have seen a good deal of high water, more in the last three years I seen more than I have seen before I think" [p. 778].

George C. Sexsmith, Vol. 3, p. 910, *et seq.*:

"I have been familiar with the Colorado river during

the winter seasons since 1893. [Tr. Vol. 3, p. 922.] There were greater floods in January, February and March, 1906, than I have ever known in the river since I have been there." [*Id.;* see also p. 931, also 934.]

Walter D. Smith, Tr. Vol. 3:

"The year 1891, if I remember, was the year that we had the great flood from Gila. That was the greatest flood that was known up to that time and my recollection is that its maximum was greater than the flood we had in 1905, but that it did not last near so long and that there was not the continuous high water in 1891 that there was in 1905, not nearly so continuous, and that the total volume did not amount to as large. Now that is my recollection. Of course the record will show that. That the total discharge during the year 1905 was greater, considerably greater, than in 1891. [Vol. III, p. 867.] In 1891 I think the flood measured 32 on the Yuma gauge. Of course that only lasted a day. It just went up to that, barely touched that and went right down. The regular annual flood in May and June, as I remember it in 1905, was unusually high and long, and in addition to that we had several rises. I think they were from the Gila and the Colorado both. We had several *unusual* rises in January, February, March and April, and had the summer floods in addition" [pp. 868-869].

C. R. Rockwood, Tr. Vol. III, pp. 1232 *et seq.*:

"I don't remember the exact number of distinct floods in 1905. My general recollection is that it was a year of floods, one coming after the other. We had unusually

high water for that season of the year in January. In February I know that we had very heavy floods, followed by heavy floods in March and very heavy floods in April. In May of course the water rose to the summer flood and continued in flood until July and then fell and rose again to the highest point reached in November. The highest point reached on the Yuma gauge since February, 1891. I have made a very careful study of the situation and of the floods of the Colorado river. From all information obtainable, not only now but previous to the exploitation I had made already during the exploitation of the canal proposition, I had made in 1892 and '93, and from no information that I have been able to obtain would it have been possible for me to justify myself in the belief that such a series of floods as happened in 1905 could have happened. The Colorado river proper, by which I mean that portion of the Colorado river which is fed by the drainage area above the Gila, is exceedingly regular in its rise and fall. There may be a very considerable difference in the height of the summer floods but it is very, very seldom that you find any fluctuation amounting to anything in the river, except during the summer rise. The Gila, which enters the river at the town of Yuma, seems to be somewhat more regular in its flood and we find from a study of the river and the records obtainable, that there is some danger of floods during the months of February and March from the Gila, but practically at no other season of the year except during the summer season. And I find in studying over the records and from the information obtainable, that where during the past 30 years there is one

year in which a flood of any moment could come down the Gila, there would probably be three years in which there would be no flood condition at all [p. 1234]. The only record that I have of a heavy flood coming down the Colorado was during the flood of February, 1891. A heavy flood had been coming down the Colorado at the same time that the flood came down the Gila [p. 1235]. From all the data I have been able to gather, I find no succession of floods such as that had during the year 1905. [Vol. IV, p. 350.] Conditions arose which I had no reason to believe could arise. A study of the history of the Colorado river would not lead me to believe that such a succession of floods could occur. If there had been but one flood of ordinary duration it would have done no harm. [Vol. IV, p. 1357.] I don't believe that the February flood of 1891 alone would have opened the intake so as to have caused any trouble." [*Id.*]

See also testimony on cross-examination, pp. 1390-91, *et seq.*

An examination of the record of the Yuma gauge and of the government records will show that the volume of water which came down the river in the years 1904, 1905, 1906 and 1907 was greater by many times than in any previous year. The volume in 1905 being very much greater than that in 1904, and 1906 being greater than that in 1905, and 1907 being greater than that of 1906. The history of the river shows that in the winter and spring whenever floods had occurred they consisted only of one flood wave going right up and right down, while the floods which came upon the management of the California Development Co. in the winter and spring of 1905

were a succession of flood waves following each other in such close succession that there would not be a subsidence of one before the other would be coming down the river. A single flood wave, that is, a flood of short duration, no matter how high the river rose, would not result in the eroding of the banks of the intake to any dangerous extent. It was only the succession or continued floods which no one had any right to expect in that season of the year that could cause any damage, and it was these continued floods of the winter and spring of 1905 that destroyed the successive attempts to close the intake and which resulted in the flooding of the lands of the complainant company.

We proceed now to present the legal principles bearing upon the question of the negligence of the defendant, and here let us say first, that the construction of this canal and cutting the intakes and diverting the water, with or without headworks, was the exercise of a legal right and the accomplishment of an enterprise encouraged by the laws both of the federal and state government, and these channels known as the Paradones and the Alamo, the latter of which, as we have before stated, constitutes the defendant's canal for many miles, and many other small and nameless channels had been made by the overflows of the waters of the Colorado river before anybody connected with the defendant knew anything of that section of the country. The means whereby overflow water came in sufficient quantities to reach the Salton Sink had been provided by the force of the Colorado floods and the laws of nature anterior to the construction of any canal or intake along the river. Ex-

perience had shown that with these means of approach to the Salton Sink, no flood of any extent had ever reached that sink except in the year 1891.

Now, when it is said that where damage is occasioned by the act of God, and if the act of man concurs with it to produce the injury, the man is still liable, it is always meant that the action or omission on the part of the person charged was itself negligence and that that negligence contributed directly to the result, and we contend here, first, that there was no negligence. Every person engaged in a work of this character is bound, of course, to foresee and provide against the ordinary perils of the country, which may reasonably be foreseen and anticipated; but is not bound to provide against unusual and extraordinary events such as have never been known to occur and could not have reasonably been foreseen by competence and skill.

A railroad company, in building a bridge over a stream, is bound to provide sufficient space for the passage of waters and also against such perils as arise from rainfalls known by experience to be incident to the particular section of the country, and which includes the ordinary floods, and such as, though rarely occurring, may reasonably be foreseen and anticipated.

Columbus, etc., Ry. Co. v. Bridges, 11th Am. St. 58;

Kansas City, M. & B. R. R. Co. v. Smith, 48 Am. St. 579.

In the latter case it was held that where the waters of the stream overflowed the country for a considerable distance, the waters thus pouring over a large extent of

country are surface waters and the railroad company is not limited in its rights and duties of making bridges across the channels of the streams, to streams of such character. The general proposition is that it is the duty of the railroad company to construct and maintain culverts sufficient to properly pass the waters of such floods as might be reasonably expected.

Sullens v. Chicago, etc., Ry. Co., 7th Am. St. 501, 505;

Emery v. Raleigh, etc., R. R. Co., 11th Am. St. 727;

De Baker v. Ry. Co., 106 Cal. 274.

But if the bridge is so constructed as to leave openings sufficient for the passage of water under circumstances reasonably to be anticipated, the railroad company is not liable to the land owners whose land was overflowed by an extraordinary flood, *though its obstruction of the stream aggravated the damage.*

Peoria, etc., R. Co. v. Barton, 38 Ill. App. 469, 470-473;

Piedmont, etc., Ry. Co. v. McKenzie, 24 Atl. 157-158.

The principles which govern railroad companies in these matters are simply the general principles applicable to all cases where the question of negligence of the character here claimed arises.

Furthermore, a defendant is not liable if the destruction would have happened though the works constructed by him had never been made, even though it may be said to have been negligence in him to have constructed the

particular work complained of. This is employed in the case last cited, and also, we think, in

Central Trust Co. v. Wabash, St. L. & P. Ry. Co., 57 Fed. 441, 446.

It was there held that the railroad company is only required to exercise reasonable diligence and precaution, and is entitled to select a safe and massive structure in place of a lighter one which would less obstruct the water; that it is not liable to action for damages if it fails to construct a culvert or bridge so as to pass extraordinary floods. That if, after all precautions have been made, excluding the idea of negligence, the overwhelming power which is technically called the "act of God," intervenes and works injury, the party is not responsible.

In

Austin & N. W. Ry. Co. v. Anderson, 23 Am. St. Rep. 350,

the court below had told the jury, among other things, that if the embankments and culverts diverted the water from its usual course and contributed to the damage of the land and crops of the plaintiff, but it should appear that the damage was caused in part by water falling and running on the land regardless of the embankments and culverts, then the defendant would be liable only for such proportion of the injury as was caused by the embankment; and if the verdict should be for the plaintiff, it should be for only the damages occasioned by the embankments and culverts.

This instruction was approved by the Supreme Court.

Now, here in this case the evidence will show that the waters of the Colorado river overflowed their bank everywhere, above and below the intake of the defendant and that these surface waters were accumulating and flowing into these various water channels, including the Alamo and the New river. The canals of the defendant were never constructed for the purpose of accumulating and collecting the surface waters that might flow over the banks of the Colorado river and even if it were responsible at all, it would not have been responsible for the damage wrought by the overflow waters. The fact that they subsequently cut out the Alamo channel to such an extent that it carried pretty much the whole Colorado river does not make the defendant liable.

In

The Inhabitants of China v. Southwick, *et al.*, 12th Me. 238,

the court below had been requested to instruct the jury that if defendants' dam was instrumental in producing the injury complained of, they were liable, although the jury might believe that the wind also contributed thereto, and that if they were satisfied that if there had been no dam whatever where the defendants' dam was in 1831, the injury would not have happened, the defendants were, in that case, still liable for the injury. The court, however, instructed the jury that if the damage was occasioned by great rains or by the violence of the wind, the defendants were not liable, if the jury was satisfied that the head of water raised by defendants' dam in 1831 was not high enough to flow plaintiffs' bridge

or do damage thereto; the verdict was for the defendants.

Chief Justice Weston, in delivering the opinion of the court, said, among other things:

"The jury have found that the head of water raised by the defendants' dam was not, at the period complained of, high enough to flow the plaintiffs' bridge or do damage thereto. Its erection then was a lawful act, not in itself calculated to do any injury to the plaintiffs. Their loss was occasioned, as the jury have found, by great rains or by the violence of the wind. If the dam had not raised the water to a certain height, the rain or the wind, super-added, might not have done the damage. It may have been one, then, of a series of causes, to which the injury may be indirectly ascribed. Their connection, however, was fortuitous and resulted from an extraordinary and unusual state of things. Neither the rain nor the wind was caused by the dam. The bridge had continued unimpaired for a series of years while the dam was higher than it was when the bridge was carried away. Such an event could not, therefore, have been reasonably calculated upon or foreseen. It would be carrying the doctrine of liability to a most unreasonable length to run up a succession of causes and hold each responsible for what followed, especially where the connection was casual and unexpected, as it was here, and where that which was attempted to be charged was in itself innocent. The law gives no encouragement to speculations of this sort. It rejects them at once. Hence, the legal maxim, *causa propinqua non remota spectator.* This principle has been extensively applied in insurance

cases * * * and it is of great practical value in settling the rights and liabilities of contending parties. Were it departed from, it would open a field of litigation which might unexpectedly bring ruin to persons engaged in lawful pursuits. If there had been no dam the injury might not have happened; but the defendants had a right to erect it and that without being held responsible for remote and unforeseen consequences."

And see the quotation in that case from

Thompson v. Crocker *et al.*, 9 Pick. 59.

Every word of this applies here. Neither of the intakes was the cause of the successive and long continued floods of the Colorado beyond all precedent in the history of the country. It may be that the presence of that canal enabled the flood waters, by cutting it wider and deeper, to discharge a greater quantity of water in the Salton Basin than would have entered there but for the presence of the canal. Admit that to be true, yet the principle which is here decided shows that the defendant was not liable, even though the plaintiff's work would not have been damaged but for the presence of the canal.

Coleman v. Kansas City, St. Joseph & Council Bluffs R. R. Co., 36 Mo. App. 476,

fully sustains the principles for which we are contending. After referring to the instructions, *Id.*, page 481-483, Judge Ellison, delivering the opinion, said:

"Instruction No. 2 in effect directed the jury to find for plaintiff, notwithstanding the storm may have been unprecedented, if they believe that defendant's negligence concurred and combined with such extraordinary

storm in causing plaintiff's injury. It was in this respect misleading. It is perhaps taken from the language of the court in Pruitt v. R. R. Co., 62 Mo. 540. This is general language used in stating an abstract rule of law. Such abstract statements are dangerous material for an instruction. Negligence, even in case of carriers, must be a co-operative cause of the loss. * * * The rule as to carriers invokes a stricter principle of law than is applicable here. For the much greater reason, therefore, the negligence in a case like the present must have been such as to have effectually caused the destruction of the crops. It must have been an efficient cause though it need not have been the sole cause. When the act of God is the cause of a loss, it is not enough, under this rule of law, to show that defendant has been guilty of negligence. The case must go further and show that such negligence was an active agent in bringing about the loss, *without which agency the loss would not have occurred.*"

We invite attention to the whole case, but particularly 36 Mo. App., pp. 491-494. We quote, however, another passage from that opinion:

"For even though the dam and overflow would not have occurred at the railroad bridge, if there had been no pilings left there, defendant is still not liable unless the pilings would have caused a dam and overflow from *an ordinary storm.*" (Italics ours.)

We have shown in this case, by mathematical computations, that without any canal there, while the Salton Sink may not have been made a lake of seventy or eighty feet in depth, if there had been no canal there, yet from

the volume of water from those floods pouring over in such rapid succession, the Salton Basin would have been filled to a depth of forty or fifty feet and the plaintiff's property would have been thereby completely annihilated just as it was.

Testimony of Hawgood, Rockwood, Follett, Corey, and Schuyler, heretofore cited on this point.

Another alleged ground of negligence is the want of controlling works at the intake. What good would a controlling works have done? We are not left to conjecture here. The defendant did construct a cement headgate for the control of the water that did effectually shut the water out, but with what result? It overflowed the banks of the Colorado both above and below this headgate and this intake, cut its way again into the Alamo canal and swept on into the Salton Sink, notwithstanding this headgate stood firm as the rock of ages, and is, so far as we know, standing there to this day. It was here that it was learned that a headgate would do no good if the waters were left to overflow the banks everywhere and the levee was built to protect it against that overflow. The proof amounts to a demonstration that if there had been no canal at all, or being one, if there had been a headgate and controlling works which neither frost nor snow, nor thunder, nor earthquake, nor tempest, nor any other power known to man, could have moved, the destruction of the plaintiff's property would have resulted just the same.

In support of the same principle see

Proctor v. Jennings, 3d Am. Reps., 240, 242-245.

It is said that the past experience and records were such that the defendant should have anticipated such things as floods in the fall of 1904, and of January and February of 1905, and the others occurring out of the usual flood season of the Colorado. It is here that the published pamphlet for the year 1905, page 17, becomes important. The ground upon which this claim is made is this: That the maximum gauge heights in feet of the Colorado river is shown to have been four times attained in seasons of the year which were not the flood season. Referring to that page they will be seen to be the following:

1891, February 26th; 1895, January 25th; 1896, December 20th; 1905, September 22nd.

We first remark that the maximum height on September 22nd, 1905, is of no significance for the canal had been constructed in October, 1904, and hence Rockwood had not that experience. Of the other three, let it be observed that no two of them occurred in the same month and each was a single flood wave of short duration. Now, the fact that these maximum heights have been known to occur out of the usual annual flood season did not put the defendant upon notice of possible dangers for these reasons:

1. Neither one of them resulted in any flood in the Salton Sink at all, unless it should be said that of February, 1891. But, as we have before said, that did not do so, for the flood did not come until May or June.

Durbrow, Tr. Vol. II, page 642.

On that occasion the flood mark was attained on Feb-

ruary 23rd and continued for one day or less, the overflow continuing to March 2, and then the gauge went down and remained below the flood mark continuously until May 6th. Hence, there were only eight days in February of a flood mark on the gauge and the flood into Salton did not come until the summer flood following.

The next out of season flood period is January 25, 1895. This would seem to be a mistake. The maximum in that year was January 21st, but again it will be observed that the flood period, even if we assume 22 as the overflow mark, continued for only six days, and there were no waters flowing into the Salton Basin from any flood during that year.

The next one noted in the printed document is December 20th, 1896, where it is said the height was 24.5. We do not know how to account for that, for, according to the gauge heights as given at Vol. VI, page 2204, for 1896, the gauge did not reach the flood point in the month of December at all, nor in November, nor in October, nor in September, until the 29th and 30th. Those were the only two days in which the flood mark was reached, if we assume that it was then 23 instead of 22, and only three days if we take 22. The 30th of September does appear to have been the maximum point for that year, but in comparing it with the flood seasons of May and June it will be seen that the water did not last for any length of time, and there was no flood, if we include 1905, in which it is said the maximum was reached on November 30th—

See Published Report, p. 17,

and which is given as 31.3 inches. This corresponds with the report for the whole year of 1905.

Same Volume, page 15.

But note now that the point of overflow was not reached until the 26th of November, where it was 26.2, and it continued over the flood point until December 3rd, a total of five days. But this is one of the floods which happened during the period here under consideration and created its havoc mainly because it was only one of a succession of floods during the same year.

2. To constitute an act of Providence it is not necessary that storms or floods should be unprecedented. If it is unusual, extraordinary and unexpected it is an act of God, and the defendant will not be liable, although such a thing may have occurred before.

Norris v. Savannah, Fla. & Western Ry. Co., 11 Am. St. 355, 358-359.

There it was claimed that the rise should have been foreseen because it had occurred in 1882 and in 1883, but the court said that that fact did not deprive the rise of 1884 of the character of an act of God, or required the appellee to have reconstructed its road or provided other means of transportation across the river to meet such emergency.

Pittsburg, Ft. Wayne & Chicago Ry. v. Gilleland; and same v. McClinton, 94 Am. Dec. 97, 104-106.

The same point is decided and the diligence required of parties concerning such matters is discussed. We quote only this much:

"In effect this was to leave it to the jury to find liability for extraordinary floods because a second and third happened like the first and came in rapid succession. If all were extraordinary, as the instruction conceives, the surprise at the second and third could not be less than at the first, and it was still more surprising that they should come in this rapid succession. Being extraordinary, neither the second nor third could have been expected more than the first."

Hence, upon the principles of these cases, the floods in January, February and March of 1905, and those which occurred subsequently in December of the same year and at other periods of 1906, were not any more to have been anticipated because of the fact that in three instances before, in different months, floods had occurred outside of the usual annual overflow. Neither was the defendant to anticipate the terrific destruction occasioned by such a flood if it should happen to occur, for none such had ever occurred before, and it would not have been occasioned this time, but for what we have so frequently alluded to, viz., the unprecedented, unheard of, continuous floods.

Finally, upon this subject and upon the question of negligence or no negligence, it is submitted that it is to be regarded by this court and considered from the standpoint of the parties at the time the thing was done and not from the events which have occurred subsequently.

In

> Long v. Pa. R. R. Co., 147 Pa. St. 343, 30 Am. St. Reps. 732, 735-736,

which opinion was written concerning the Johnstown

flood, the court at the pages indicated, explicitly held in accordance with this proposition.

While on this subject we call attention to other propositions applicable alike to the question of whether an injunction should have been issued in this cause or the damages awarded.

The burden of proof is upon the plaintiff and to warrant the court in issuing an injunction, the evidence should be clear and explicit. We have already cited some of the authorities to the effect that the proof must be clear and convincing and the damage real and substantial.

Yarwood v. West L. A. Water Co., 132 Cal. 204;
Fisher v. Feige, 137 Cal. 39;
Coleman v. Le Franc, 137 Cal. 214;
Real del Monte Min. Co. v. The Pond Min. Co., 23 Cal. 83, 85.

It is not enough for the plaintiff merely to produce a conflict in the evidence, nor even a probability of the result. Courts of equity will not grant injunctions and undertake to control the management of the business of people or restrain them in the exercise of their property rights unless the right to the injunction is clearly proven by competent evidence. Merely to raise the probability of irreparable injury is not sufficient.

McCarthy v. Bunker Hill & Sullivan Min. Co., 147 Fed. 981, 984.

The injunction will not be granted on conflicting evidence.

Bank of Commerce v. McAfee, *et al.*, 34 S. E. 1037.

Nor upon doubtful evidence.

Philadelphia's App., 78 Pa. St. 33.

That the burden of proof is upon the plaintiff is decided in

Hampson v. Adams, 57 Pac. 621, 622.

And furthermore, where the act of God concurred with the act of the defendant, the burden of proof is upon the plaintiff to show that the injury was not the result of the act of God.

Morris v. Receivers, etc., R. Co., 65 Fed. 584-585.

We quote this one remark:

"Our law holds that where damages occurred from an act of God and from the negligence of man concurring co-incidentally, there can be no recovery unless it be affirmatively proved that if there had been no act of God the damage would still have occurred."

In all legal controversies the plaintiff must prove, by a preponderance of evidence, the facts which constitute his cause of action, and the damages must be proven by evidence which fairly leads to a certain conclusion. If it is left as a mere matter of conjecture the proof is not sufficient.

Patton v. Texas & P. R. Co., 179 U. S. 658, 45 L. Ed. 361, 364;

Waters-Pierce Oil Co. v. Van Elderen, 137 Fed. 557;

Soremson v. Menasha P. & P. Co., 14 N. W. 446, 447-448;

Trapnel v. City of Red Oak Junction, 39 N. W. 884, 885.

Before passing this, we call attention to one kind of evidence introduced in this case upon this subject of negligence, which, it is submitted, is absolutely worthless, and indeed, is not competent at all. These were certain declarations of officers of this company offered in this case. Among them Drury testifies that Rockwood, when first at Salton, looking over the waters, said that he supposed that he would have to pay for the damage then done.

Tr. Vol. V, pages 1970, 1971.

Rockwood denies this.

Tr. Vol. IV, pages 1573 and 1574.

Another declaration claimed to be made by somebody, either Chaffey or Rockwood, or Chaffey in the presence of Rockwood, is that he could cut a canal that would take the waters of the Colorado river and fill the Salton Sink in sixty days to such an extent that it could not be gotten out in sixty years. Of what place this statement referred to, nobody seems to have known.

Testimony of Ferguson, Cross-examination, Vol. II, page 426.

But these declarations are admitted apparently for the purpose of bringing home to the defendant a knowledge of the fact that there was danger from the cutting of these canals. Of course, no one can be held respon-

sible for things which he could not foresee, and to constitute negligence, it must be shown that the party has knowledge of the dangers or that the facts are such that, as a prudent person, he ought to have known.

But these declarations, it is submitted, were not admissible in evidence at all. Even if Rockwood had been the agent of the defendant, his declarations sought to be proved against him would not have been admissible under any principle. The rule admitting declarations of an agent is founded upon the legal identity of the agent and principal, and therefore they bind only so far as there is authority to make them.

1st Greenleaf on Evidence, Sec. 114.

And see

1st Greenleaf, Secs. 108 to 114.

Whenever these declarations are merely narrative of a past occurrence, they cannot be received as proof of such occurrence.

1st Greenleaf, Sec. 110.

The declaration of Rockwood that he supposed that he would have to pay for this has no tendency to show that he had knowledge, when the intake was constructed, that any such a result would follow. On the contrary it would seem to very strongly imply that he did not have the knowledge.

As to the other declarations, they are only admissible upon the theory that some such relation existed as agency, partner, etc., and that the declarations were

made while he was engaged in the business concerning which they were made.

Strong's Executors v. Brewer, 17th Ala. 706;
Walden v. Purvis, 73 Cal. 518;
20th Century Digest, Col. 1233, Sec. 867;
Walker v. Blassingame, 17th Ala. 810;
Gregory v. Walker, 38 Ala. 26;
Prater v. Frazier, 11th Ark. 249.

They must be made while engaged in the performance of an act in the scope of his authority and at the time he is doing it and must be concerning the act he is doing.

Garfield v. Knight's Ferry, etc., Water Co., 14 Cal. 36;
Neely v. Naglee, 23 Cal. 152;
Herman Waldeck & Co. v. Pac. Coast S. S. Co., 83 Pac. 58;
Barkly v. Copeland, 86 Cal. 483, 492;
People v. Stanley, 47 Cal. 114.

They are not admissible as the declarations of an officer of a corporation.

1st Johns on Evidence, Secs. 269-270;
American Life Ins. Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593, 595;
Packet Co. v. Clough, 87 U. S. 528, 22 L. Ed. 406, 408;
Fogg v. Pew, 71 Am. Dec. 662, *Id.* 664;
1st Natl. Bank of Lyons v. Ocean Natl. Bank, 19th Am. Rep. 181, 191-192.

A corporation is not chargeable with knowledge of facts merely because those facts were known to its incorporators or stockholders or clerk.

2nd Cook on Corporations, Sec. 727;
Davis etc. Co. v. Davis etc. Co., 20 Fed. Rep. 699, 700-701;
Goodloe v. Godley, 21 Miss. 233;
Edwards v. Carson Water Co., 21 Nev. 469.

Of the supposed declaration of somebody that a canal could be cut that would put in the Salton Basin the waters of the Colorado in sixty days that could not be gotten out in sixty years, there is this further to be said. Nobody pretended to say to what the supposed declaration was alluding. The remark itself seems to be the statement of something to be avoided rather than to be done. It is not in any way connected with any one of the three intakes, and it could have had no reference to any except the first, for that is the only one that Chaffey had anything to do with.

Tr. Vol. II, page 426.

XIX.

The court erred in giving a decree in this cause either for the injunction or the damages, or any part of said damages.

Of course if we are correct in our contention that the injury was not due to the negligence of the defendant, but was the act of God, plaintiff was not entitled to any relief against the defendant.

So, too, we maintain that if an injunction could not be

given in this cause because of the absence of parties materially to be affected thereby, then the bill should have been dismissed.

It has no doubt been held in many cases, that where a court of equity has acquired jurisdiction on some grounds of equity jurisprudence, and at the commencement of the suit the plaintiff was entitled to relief by injunction or other equitable relief, but from some cause intervening after the commencement of the suit, the right to equitable relief has ceased, the court may nevertheless proceed to award the relief to which the plaintiff may have proved himself entitled, though that relief might not have been of a character over which the court of equity had jurisdiction. But we take it that the rule is universal that where a bill is filed for equitable relief, and other relief is sought incidentally thereto which is not of itself within the cognizance of a court of equity, if there is a failure of proof of the equitable cause of action, and it is determined by the court that the complainant was not at the commencement of the suit entitled to the relief in equity, the bill will be dismissed and will not be retained for the purpose of allowing legal relief though plaintiff may have shown himself entitled thereto.

Dowell v. Mitchell, 105 U. S. 430, 26 L. Ed. 1142.

From this case we quote the following passage:

"The rule is, that where a cause of action cognizable at law is entertained in equity on the ground of some equitable relief sought by the bill, which it turns out cannot, for defect of proof or other reason, be granted, the court is without jurisdiction to proceed further, and

should dismiss the bill and remit the cause to a court of law."

26 L. Ed. 1143. (Many cases are cited.)

To the same effect we cite the following cases:

Clark v. Smith, 86 N. Y. Suppl. 472, 474;
Crowell v. Young, 64 S. W. 607, 608-609;
Dodd v. Home Mutual Ins. Co., 28 Pac. 881, 884;
Denny v. McCown, 54 Pac. 952, 954;
Dakin v. Union Pac. Ry. Co., 5 Fed. 665, 666;
Alger v. Anderson, 92 Fed. 696, 707, 712-713, 714.

In this last case the question is very thoroughly considered, and the authorities, both English and American, reviewed.

Kessler v. Ensley Company, 123 Fed. 546, 547;
Capen v. Leach, 65 N. E. 63.
Collier v. Collier, 33 Atl. 193,

goes further and holds that it is by no means a universal rule that a court of equity will proceed to give legal relief, although the equitable right may be proven, and cites, among other cases,

Iszard v. Water Power Co., 31 N. J. Eq. 511.

And then the court makes this remark:

"A moment's reflection will satisfy every one that nothing could be more mischievous than the adoption of the principle contended for by the complainant. In such case it would only be necessary for the defendant in an action at law to make some pretense of claim against the plaintiff in such action of fraud, mistake, accident or right to an account, in order to change the forum of liti-

gation, and to compel the determination of questions purely legal in a court of equity."

33 Atl. 194.

And where one against whom the plaintiff's demand is purely legal is unnecessarily made a party to a suit in equity, the legal demand cannot be enforced in that suit.

Bradford v. Long, 4 Bibb (Ky.) 225;

Fultz v. Walters, 2 Mont. 165.

The plaintiff never was entitled to an injunction in this cause, and the bill should have been dismissed.

XX.

The evidence in the cause was insufficient to prove the damages alleged and for which the judgment was given, or any item thereof, and the evidence in the cause is too uncertain to establish any amount of damage suffered by the complainant.

We have already established by the authorities cited the following propositions:

1. The burden of proof was on plaintiff.

2. That under the conditions admittedly present in this cause, the burden of proof was upon the plaintiff to show that the injury was not caused by the act of God.

3. That if part of the damage was due to the negligence of the defendant, and another part to the act of God, the burden was upon the plaintiff to prove convincingly what part was due to the negligence of the defendant, and as to the other part, the plaintiff was not entitled to recover.

4. That the burden is not only upon the plaintiff, but

the facts upon which the right of action depends, must be proven clearly and convincingly.

5. It is not enough to establish facts from which an inference might be drawn, but the facts must lead by certain and definite conclusion to the inference against the defendant.

6. In the proof of damages, the amount ascertained must be either directly established, or the amount must be the fair and legitimate conclusion from the evidence; to establish facts from which either the existence of damage or the amount may be conjectured, or afford the material for a guess, does not entitle the plaintiff to recover at all.

Under this proposition, we call the court's attention to the following objections to the evidence:

1. In awarding damages for the buildings, machinery, etc., the evidence is mainly directed to the proof of cost of reconstructing the buildings.

Frederickson, Tr. Vol. II, pages 572 *et seq.*

Drury, Vol. II, pages 558 *et seq.*, and pages 613 to 617.

To do this, prices of material were taken which were obtained from lumber merchants in part, within a week before the evidence was given, although the destruction occurred nearly two years before. The price, too, was the price at Los Angeles.

The buildings were, many of them, of many years standing, and the machinery had been long in use. And it is submitted upon the evidence of the character which we have just stated, the court could not form any certain

and definite conclusion as to the amount of damage suffered by the plaintiff.

2. The salt crust. To this we have already referred. The manner of ascertaining the amount of the salt crust did not warrant any definite conclusion as to the amount. The compensation made was the full value as testified by the plaintiff, of that salt crust. And that assumed, of course, that the salt crust was utterly destroyed. And that fact is not only not established by any clear and convincing evidence, but the evidence shows beyond controversy that it wasn't lost, that it was simply held in solution, and there was no reason to believe that the plaintiff's salt beds would have any less salt when the water was evaporated than it had before the flood.

It is uncertain where that salt crust was located.

Testimony of Henton, Tr. Vol. II, pages 627 *et seq.;*

Testimony of Sherman, Tr. Vol. II, pages 469 *et seq.,* and page 476;

Testimony of Drury, Tr. Vol. II, pages 598 *et seq.* and 619 *et seq.*

And see testimony of Durbrow as to the effect of the flood of 1891 on the salt.

Tr. Vol. II, pages 643, 646, 647, 661.

As to other times, from rains,

Pages 653, 654, 658.

3. It was shown by the evidence that the plaintiff never did manufacture or take salt from any lands except a part of section 15, and section 22, and upon this latter

section they were mining at the time of this destruction, and had been for a long time previous.

Now, the lands in section 22 did not belong to the plaintiff, and yet it is not certain that in the estimate of the 1,500,000 tons the witnesses were not including salt crust on section 22 as well. The salt was then being mined from section 22, which the complainant did not own.

Tr. Vol. II, p. 629.

4. The plaintiff was not entitled to recover for the salt in the vats.

The evidence shows that this salt was all on section 22, and that the plaintiff was not the owner of the land, nor of any right, title nor interest in it.

See description in the bill of complaint,

Tr. Vol. I, p. 7 (Complaint in Superior Court),
id. p. 61 (Bill in Equity).

In the decree,

Tr. Vol. I, p. 136.

In the evidence,

Exhibits D to L, inclusive, Tr. Vol. V, pages 2034 *et seq.;*
Henton, Vol. II, page 623.

These vats were shown to consist of trenches or pits dug in the ground, of varying lengths where the waters naturally in the soil are all the time seeping in, and evaporated leaving the salt, and when evaporated the salt in the vats is left on section 22.

5. In the items of damage in the summary [Vol. I, p. 132], is "Salt destroyed at mill."

Now a large part of that salt had been moved once, but wasn't moved out of danger. And the expense of protecting works and moving salt is also charged up in the bill, and is allowed in the decree.

Tr. Vol. I, p. 132.

They took the wreckage of one of the buildings, and built another building. And that was subsequently destroyed by the flood. And we are charged with the work of moving it, and with the buildings destroyed.

They constructed a levee which was utterly insufficient for protection, and which was itself swept away.

Drury, Tr. Vol. II, pages 601 and 602, 605 to 610;

Henton, *id.*, pages 628 *et seq.*

It is the established doctrine that there is an obligation imposed upon him whose property is threatened with destruction, or, damage is about to result either from a tort or breach of a contract, to use all reasonable means to make the damages as small as possible.

Mabb v. Stewart, 147 Cal. 413, 417, 419;

Warren v. Stoddart, 105 U. S. 224; 26 L. Ed. 1117, 1120;

Baird v. United States, 17 Wall. 463, 21 L. Ed. 519.

And this the plaintiff recognized, and undertook to prove that it had discharged that burden.

Drury, Tr. Vol. II, pages 601 *et seq.;*

Henton, Vol. II, p. 627.

But it will be seen that much of the property was moved twice, and yet destroyed by the subsequent rise of the waters. From the time the waters began to threaten the plaintiff's works, the plaintiff could have removed everything there was there to destroy except the salt crust. It has endeavored to excuse the building of an insufficient levee by saying that they hoped by the levee to gain time to move the property. But looking at the evidence of the time that it took them to build the levee, and up to the time the water reached the levee, they could have moved everything.

Now, the point we make upon this proposition is this:

The New Liverpool Salt Company knew everything about that country, the Colorado river, its various overflows, the channels which they had made, the elevation of the Salton Sink, that it was far below the sea level; we say it knew all these things, or ought to have known them better than the defendant.

The plaintiff's works were established in 188—

Tr. Vol. II, pages 634 *et seq.*

It was there in the flood of 1891, and its property was injured during that flood.

If it could have removed the property from danger and did not, was it not, under the circumstances, guilty of negligence, and was not the loss of much of its property the result of its own negligence, and not that of the defendant?

It makes little difference, as it seems to us, which way this question is answered.

That the plaintiff could not be held guilty of negligence in not foreseeing the results that happened, we are

not disposed to deny. But if it was not guilty of negligence in not anticipating such results, then upon what ground is the defendant to be held guilty of negligence in not foreseeing the same thing? If proper prudence required the defendant to anticipate such havoc, then proper prudence required plaintiff to remove this property to a place of safety. If it built a levee which it ought to have foreseen would prove insufficient, upon what principle can the cost of that construction be charged to the defendant?

Finally, we submit that the evidence of the plaintiff does not proceed upon the true measure of damages; that if we are to proceed upon the theory that this was a permanent injury, then the difference between the value of the plaintiff's property before and after this flood, was the true measure of damages.

And no proof was offered of any such damages.

In many cases it has been said that the rental value, where the injury is not permanent in the sense of being everlasting, is the true measure.

But if that measure were adopted here, then the defendant could not be charged with the value of the salt, for, as the land had no other value than for the salt upon it, its rental value would have consisted of the carrying on of a business which would eventually exhaust the property of all value.

XXI.

The court erred in giving judgment in favor of the complainant for the sum of $456,746.23.

To this is added, that the complainant was not entitled to recover any damages at all in this suit.

Every question involved in this specification has already been sufficiently discussed.

XXII.

If the complainant is entitled to recover damages at all, the court erred in awarding damages up to the time of judgment.

The point here intended to be raised is this: If the injury here is not permanent, and the plaintiff is entitled to recover at all, then it was only entitled to recover damages accruing up to the time of the commencement of the action.

XXIII.

The court erred in permitting the complainant to file the several supplemental bills herein.

Upon this proposition we desire to add nothing further than this:

1. If the plaintiff was not entitled to the injunction from the beginning, it was not entitled to recover any damages, and as the supplemental bills deal with nothing but additional damages, they ought not to have been allowed.

2. If the plaintiff was entitled to recover damages only up to the time of the commencement of the suit, it

was not entitled to file these supplemental bills, nor to recover in accordance with them after they were filed.

It is respectfully submitted that because of the errors aforesaid, the decree herein ought to be reversed, with directions to the court below to dismiss the bill.

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Attorneys for Appellant.

No. 1584

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit.

THE CALIFORNIA DEVELOPMENT COMPANY,

Appellant,

vs.

THE NEW LIVERPOOL SALT COMPANY (a corporation),

Appellee.

BRIEF OF APPELLEE.

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Of Counsel.

Filed this.....day of August, A. D. 1908.

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BRIEF OF APPELLEE.

STATEMENT OF THE CASE.

Following is a brief statement of the facts:

In November, 1904, and for a long time prior to that date, complainant (appellee) was the owner of lands in Salton Basin described as follows:

Sections eleven (11), fifteen (15) and twenty-three (23), and the northeast quarter of the northwest quarter of section fourteen (14), and the northeast quarter of the northeast quarter of section fourteen (14), all in township eight (8) south, range ten (10) east, San

Bernardino Meridian, in the County of Riverside, State of California; and was the owner of a mill, warehouse, railroad track and other improvements used by it in gathering and refining salt, in which business it was at that time engaged. The lands owned by it contained very extensive deposits of marketable salt.

Long prior to November, 1904, defendant constructed a canal leading from Colorado River to Imperial Valley. Its first intake was protected by a gate, which was constructed under the supervision of one Chaffee, who was then in charge of the construction of its works. This gate was placed at what is described in the record as intake No. 1. Later, probably in the early part of 1904, it connected its canal with the river by a second intake. This second intake was never protected by any gate or headworks and, with the exception of temporary brush dams, remained open from the time it was cut until all of complainant's property was destroyed. In October, 1904, a third intake was cut connecting the canal with the river, and no headgate or works were constructed to control the flow of water into this intake until long after the destruction of complainant's property. All of these intakes were cut in low alluvial soil, and nothing whatever was done, so far as intakes 2 and 3 were concerned, to prevent the current cutting and widening the openings, as might naturally and inevitably have been expected to be the result without protecting headworks.

So far as the record discloses, there was no flood in Salton Sink—after the subsidence of what is known as

the 1891 flood—up to October, 1904, when water began to collect there. The water continued to accumulate until the latter part of 1905, and, indeed, continued to increase after that date, but by October, 1905. it had accumulated to such an extent as to destroy all of complainant's improvements and salt and make it impossible longer for it to carry on its operations.

According to the testimony of the experts who speculated upon the subject it will require twenty years or more for the water to evaporate from Salton Sink.

Colorado River almost invariably overflows its banks during what is known as the summer flood, which ordinarily lasts during portions of the months of May, June and July. However, some of the largest floods which ever occurred happened in the spring of the year. The gauge records, which were offered in evidence, show that it is quite impossible to say with any degree of certainty when high water will occur. Indeed, it has occurred—looking at the record for twenty years—in almost every month of the year; that is to say, not in every month of every year, but for the period covered by the gauge record, there is hardly a month of the twelve in which exceedingly high water has not prevailed during one or more years.

The flood season of 1904 was of very short duration, and that year was a period of comparatively low water. 1903 was a year of comparatively high water, but no water appeared in Salton Sink during that year.

As has been said, intakes 2 and 3 were not cut until 1904. Intake No. 1 was cut before 1903 and was in use during that year, but was protected by a headgate.

There is no claim or pretense that any of the flood waters of 1904 reached Salton Sink.

That a great deal of water was diverted from Colorado River through the intakes of defendant in 1904 and carried through defendant's canal and eventually discharged so as to flow into Salton Sink, and that this continued through 1905, is practically not denied. It is testified positively, and we may fairly say is conclusively shown, and is not denied with any show of sincerity, that the water which reached the salt works up to October, 1905, and worked the destruction of complainant's property, flowed into the intakes and through the canal of defendant.

The present suit was commenced in the Superior Court of California, for the County of Riverside, by the filing of a complaint which alleged, in substance, that plaintiff was the owner of a certain large tract of land in said county upon which plaintiff was engaged in the business of mining and refining salt, and upon which was a mill and various buildings used in said business; that the business carried on was large and extensive, and that plaintiff was engaged in mining, refining and selling many thousand tons of salt yearly; that certain portions of the land were of great value by reason of having upon them large deposits of salt; that the Colorado River did not naturally flow upon or near the said lands of plaintiff; that defendant for more than one year had

been diverting the water of the Colorado River and distributing it by canals, and had constructed upon said river three intakes for that purpose and was thereby diverting from 800 to 3,000 cubic feet per second to such places; that the water, except such as is absorbed and evaporated, naturally finds its way to plaintiff's said lands; that defendant, for more than six months had been, and then was, diverting said water in such manner and quantity that from 300 to 500 cubic feet per second passed through defendant's canals in excess of the amount absorbed or evaporated or used, with the result that for more than three months prior to the filing of said complaint, said flow of from 300 to 500 cubic feet per second had been continuously wasting from the canal system of the defendant and pouring into the Salton Sink and upon the lands of plaintiff, and had produced in said sink a lake of over 20 miles in length and several miles in width, and had covered various portions of the lands of plaintiff, and would extend still further but for the dikes built by plaintiff; that the amount of water in said lake, at the time of the filing of said complaint, was constantly increasing and, unless checked, would in a short time overflow the dikes and flood more lands of the plaintiff, and particularly the lands about plaintiff's buildings and endanger their security by rendering their foundations insecure; that many thousands of tons of salt piled by plaintiff upon the ground would be destroyed and ruined; that said waste water carried with it large quantities of sand, silt and mud, and had already damaged the salt naturally on said lands of plaintiff, and that said damage was constantly being increased;

that plaintiff was the owner of a railroad running from its mill for a distance of over three miles; that said railroad had been entirely covered by the overflow of said waste waters, and that, by reason of the continued existence of said lake, the deposit of said silt and mud thereon was constantly increasing; that waste water in very large quantities was, at the time of the filing of said complaint, running into said lake and increasing the size thereof, and there was danger that all the property of plaintiff would be covered by water and its business destroyed; that if the defendant should be restrained from diverting the waters of the Colorado River into said lake, the lake would evaporate and disappear; that otherwise plaintiff would suffer great and irreparable injury by the destruction of its property and of its business; that the flooding and overflow of the lands of plaintiff was caused by the diversion by defendant of water from the Colorado River in excess of the amount required for any useful purpose whatever, and that by a continuance of said waste, a flood would result from the continued diversion by defendant of the waters of the Colorado River; that defendant in the construction of its intakes had made no provision whatsoever for the control or regulation of the amount of water diverted by it into said intakes and canals, and that, unless defendant were required to construct headgates for controlling the amount of water flowing into its canals, the water would continue to flow through said canals in amounts greatly in excess of that required for any proper use and would flow into the said lake and upon the lands of plaintiff and

destroy and ruin the property and business of plaintiff; that defendant, unless restrained, would continue to divert large quantities of water and flood the lands of plaintiff and thereby destroy its property and business. Damages in the sum of $87,000 were specified as already sustained by plaintiff, and there was a prayer for an injunction, for said damages and for general relief (Trans., Vol. I, pages 7 to 16).

The case of

McLaughlin v. Del Re, 64 Cal. 472,

in the decision of which Judge Ross participated, is sufficient authority for the above complaint in the State Court. It was held that

> "The action is in equity, the main purpose of it being to obtain a final decree restraining the continuance or repetition of the trespasses alleged, which are of a character, as claimed, to produce irreparable injury."

It was accordingly held that the Court, and not a jury, must determine the incidental issue as to damages.

The present case was, upon petition of defendant, removed into the Circuit Court for the Southern District of California. There the plaintiff modified the form of the complaint in order to comply with the formal requirements of the equity rules. For example, the pleading was designated as a "bill in equity"; it was directed "To the Justices of the Circuit Court" etc.; its phraseology was generally adapted to the chancery practice, and, most important, answer under oath was expressly waived (Trans., Vol. I, pages 61 to 72). This remodelled

bill of complaint was filed in the Circuit Court on June 16, 1905.

On January 29, 1906, complainant filed a supplemental bill showing that, by reason of the continuance and increase in the amount of flood, additional damage in the sum of $180,000 had been done to the lands and salt deposits of complainant, and, further, that the building, sheds, mill and machinery of complainant had been utterly destroyed, to complainant's further damage in the sum of $30,000 (Trans., Vol. I, pages 79 to 80).

On December 19, 1907, complainant filed an amendment to the supplemental bill of complaint, substituting $325,000 for $180,000 as the additional damage to the lands and salt deposits, and substituting $75,000 in place of $30,000 as the damage to sheds, mill and machinery of the complainant (Trans., Vol. I, pages 126-127).

The answer upon which defendant based its defense consists principally of a denial of responsibility for the flooding of complainant's lands (Trans., Vol. 1, pages 102 to 122).

After a most protracted hearing and elaborate argument, the Court found that the principal questions in the case were questions of fact; that the waters which overflowed complainant's lands and destroyed its property were largely, if not entirely, the waters diverted from the Colorado River through defendant's intakes; that defendant was negligent, among other respects, in not selecting proper places for said intakes, and in not providing suitable headgates to control the flow of water

through the intakes, and that such negligence was the direct and proximate cause of the overflow of complainant's lands and the resulting loss of its property, and held that complainant was entitled to a perpetual injunction against the continuance of the overflow. Damages were assessed in the sum of $456,746.23 for the injuries theretofore sustained by complainant (Trans., Vol. I, pages 128 to 132).

The above brief statement of the simple facts is perhaps sufficient to enable the Court to decide the few uncomplicated questions of law that are raised by appellant; but to comprehend and realize the magnitude of the negligence of the defendant corporation, it will be necessary for the Court to study carefully each of the twenty-four hundred odd pages of the record.

A dramatic summary of the case may be found in the message of the President of the United States relative to the overflow of the Colorado River caused by the appellant (Trans., Vol. V, pages 2086 to 2099).

ARGUMENT.

UNDER THE CASE STATED BY THE BILL AND FOUND BY THE COURT, A COURT OF EQUITY HAS JURISDICTION TO GRANT INJUNCTIVE RELIEF.

In the present case, there are many grounds, upon any one of which equity is accustomed to grant injunctions.

The real property of complainant was threatened with irreparable injury. Its salt mines were in process of absolute destruction; its business was being ruined, and

for the loss of profit there could be no adequate compensation at law. Further, the wrongs and injuries being inflicted were continuous and uninterrupted, and if not restrained would require plaintiff to bring successive actions at law in order to prevent the wrong from ripening by prescription into a right. We do not understand counsel for appellant to contend that, at the time of the filing of the bill, there was any lack of equity jurisdiction to issue an injunction.

Pomeroy, 3rd Ed., Secs. 138, 1356-1357.

In

Story's Equity, Section 927,

it is well said:

> "Cases of a nature, calling for the like remedial interposition of courts of equity are, the obstruction of water courses, the diversion of streams from mills, *the back flowage on mills, and the pulling down of the banks of rivers, and thereby exposing adjacent lands to inundation, or adjacent mills to destruction.*"

The principal ground upon which this Court is asked to reverse the decision of the Circuit Court is that damages cannot be given in a suit in equity in the federal Courts where the jurisdiction has attached by reason of the right to injunctive relief. The contention, briefly stated, is that "legal and equitable causes cannot be blended"; that "the constitution of the United States " secures the right of trial by jury in all actions at law"; that "where there is a plain, adequate and complete " remedy at law, the plaintiff must * * * proceed " at law because the defendant has a constitutional right

"to trial by jury" and so on (Brief of Appellant, pages 62 to 75).

The general rule stated by counsel may well be conceded. But the point to be determined here is whether a court of equity, having acquired jurisdiction of the controversy by reason of the necessity for injunctive relief, may not, in order to do complete justice between the parties and put an end to the controversy, assess the damages that have been sustained by reason of the wrongs the continuance of which is to be enjoined. Is the Court, after having heard and determined the issues in the case, to send the plaintiff out of Court with only a portion of the relief to which he is entitled and put upon him the necessity of re-litigating the case at law? Such is not the practice of courts of equity.

In

Jesus College v. Bloom, 3 Atkins 262, 263,

Lord Chancellor Hardwick said:

> "So, in bills for injunctions, the court will make a complete decree, and give the party a satisfaction, and not oblige him to bring an action at law, as well as a bill here."

And speaking of compensatory damages in cases where an injunction is prayed, he says, "it is the common case". That was in the year 1745.

Winslow v. Nayson, 113 Mass. 411,

was a bill in equity to prevent a threatened trespass upon land. Mr. Justice Gray, then Chief Justice of Massachusetts, than whom there has been no Judge better acquainted with, or more adherent to, authority,

in delivering the unanimous judgment of the Supreme Court of that State, said (page 421):

> "And the court having obtained jurisdiction in equity of the case for this purpose, may properly, in order to prevent multiplicity of suits and to do complete justice between the parties, *under the prayer for general relief,* also award damages for the injury already done by the defendants to the plaintiffs' premises instead of obliging them to bring a separate action at law therefor," citing cases.

In

Hopkins v. Grimshaw, 165 U. S. 342; 41 L. Ed. 739,

Mr. Justice Gray declared the judgment of the Supreme Court to the same effect.

In

Omaha Horse Ry. Co. v. Cable Tramway Co., 32 Fed. 727,

Mr. Justice Brewer, in a suit for an injunction against the unlawful construction of a street railway, directed an assessment of the damages sustained by complainant on the theory that

> "inasmuch as the prayer for relief contains also the general prayer for other and further relief, it is familiar law that the court may award such other relief as is justified by the facts stated in the bill, and may fairly have been considered within the contemplation of the parties in the litigation."

In

Woodbury v. Marblehead Water Co., 15 N. E. 282,

which was a bill to restrain a water company from trespassing on plaintiff's land, Mr. Justice Holmes, speak-

ing for the Supreme Court of Massachusetts, ordered an assessment of damages although the ground for issuing an injunction had been removed since the filing of the bill.

In *U. S. v. Guglard,* 79 Fed. 21, it is said:

> "Where a bill shows cause for equitable relief by injunction to stay destructive and continuous trespass in the nature of waste, the court, to prevent another suit, will decree an account and satisfaction for the injuries already done. (Citing cases.) And when jurisdiction is thus acquired, the fact that items of account are all on one side does not affect the rule. In some of the cases cited above there was no mutuality in the accounts. As already stated, complainant's right to an injunction is sufficient to sustain the jurisdiction of a court of equity, and, in the exercise of such jurisdiction, the court will grant all the relief which the circumstances of the case require."

In

High on Injunctions, 2nd Ed., Section 669,

the rule is stated to be that

> "Where, therefore, a proper case is presented for an injunction, an account of the waste already committed and a decree for damages may be had in the injunction suit. Indeed, this would seem to be but the exercise of the ordinary prerogative of equity, that when one resorts to a court of equity for one purpose, his case will be retained until the entire matter is disposed of, upon the principle that the court having jurisdiction of the cause for one purpose will retain it to give general and complete relief, thereby preventing a multiplicity of suits."

In

Pomeroy's Equity Jurisprudence, Sections 236 and 237,

the cases are reviewed and the rule stated that

> "Equity therefore assumed a jurisdiction to grant an injunction restraining the commission of actual or threatened waste; and having obtained jurisdiction for the purpose of awarding this special relief, which, in many instances, is not complete, the court will retain the cause, and decree full and final relief, *including damages,* and when necessary, an abatement of whatever creates the waste or causes the nuisance."

And in 16 Cyc. 109, it is said that

> "Under a variety of circumstances the court for the same reason, and as incidental to equitable relief, may order the payment of money, although a separate action at law would lie therefor. *Thus the jurisdiction of equity having been invoked to restrain the further commission of wrongful acts, damages already suffered will quite generally be awarded."*

In

Whipple v. Village of Fair Haven, 21 Atl. (Vt.) 533,

a suit to restrain town trustees from flooding the land of complainant, the court said:

> "The defendant also claims that the orators have an adequate remedy at law and therefore cannot resort to chancery. The case of Field v. West Orange, 36 N. J. Eq. 118, above referred to, which is very much like this case in its facts, is full authority for granting the injunction prayed for; *and it is a familiar rule that, when the court of chancery has jurisdiction of a case for one purpose it will retain*

it for all other purposes, and dispose of the whole matter. And this is a salutary rule for it prevents litigation, and to that end is for the public good.'' The Court proceeded to assess damages.

In

Garvey v. Long Island R. R. Co., 159 N. Y. 323,

the contention of appellant, by way of amusing contract to the contention of appellant here, was that ''the judg- ''ment is fatally inconsistent in that it awards no dam- '' ages, but, nevertheless, grants an injunction'' (page 327), but the Court said:

> ''A court of equity has jurisdiction of an action to restrain the commission of a continuing trespass, because the injunction prevents a multiplicity of actions at law, which is a grievance to the parties and a burden upon the public'' (citing cases). ''While in such an action the court may also render judgment for the damages already sustained, that relief is merely incidental and is not an essential part of the main cause of action for a permanent injunction.''

In

Martin v. Price, L. R. 1 Ch. 277 (1894),

the order of the Court of Appeal was (see page 285):

> ''To grant an injunction in the ordinary form to restrain the defendant from continuing to build higher than the old building above the level of the street, to the injury of the plaintiff, *and to grant an inquiry by the official referee as to the damages sustained by the plaintiff by reason of the building already erected beyond that height, and to order the defendant to pay such damages.''*

We have carefully examined all the cases cited by appellant upon this point. The only case that to our mind has the slightest bearing is that of

Indian Land & Trust Co. v. Shoenfelt, 135 Fed. 484.

There it was held that

> "A court of equity has no jurisdiction to enjoin a *single* trespass upon agricultural land where the probable injury is not shown to be destructive *of any part* of the real property or irremediable, and an action at law for damages will afford adequate satisfaction."

Consequently, inasmuch as the bill showed no grounds for injunctive relief, it was not retained for the mere purpose of giving damages.

Appellant cites (Brief, page 63) *1 Beach Modern Equity,* Sections 5-6. The effect of these sections is that the distinction between legal and equitable modes of proceeding is maintained in the Federal Courts. We do not dispute the general proposition there laid down. But, to show how inapplicable the above mentioned general rule is to the facts of the present case, it is only necessary to turn to *Section 91* of the same treatise. There it is said:

> "Upon a bill for an injunction to prevent a threatened trespass, *the court may, under a prayer for general relief and in order to avoid a multiplicity of suits, award damages for the injury done by such trespass before the injunction was issued.*"

NEITHER THE MEXICAN COMPANY NOR THE IMPERIAL WATER COMPANIES WERE INDISPENSABLE PARTIES DEFENDANT.

The companies that appellant contends were indispensable parties defendant were,

First. A corporation called the "Mexican Company", organized by the stockholders of the California Development Company for the express and admitted purpose of carrying out the will of the California Development Company in transacting its business and owning lands in Mexico, the laws of which forbid the owning of lands by foreign corporations;

Second. Certain corporations called "Imperial Water Company Nos. 1, 2, 3", and so on, formed by the same stockholders (Appellant's Brief, pages 76-92).

The purpose of these companies was to systematize the work of distribution of the water after diversion. These subsidiary Imperial Water Companies made contracts (Trans., Vol. I, pages 226-249) with the Mexican Company for a certain amount of water a year for each share of stock to be sold by the California Development Company.

Concerning the relation of the defendant to the so-called Mexican Company—which defendant claims should have been formally made a party defendant here —Mr. Meserve, in his Washington statement, said (Trans., p. 2151)—and we may say in passing that it is only necessary to accept the statements of Mr. Meserve in order to conclusively show the negligence of defendant and its responsibility for the damage worked to complainant:

" It was the purpose of the California Development " Company to purchase these lands direct, but it was " found that, under the laws of the Republic of Mexico, " American citizens could not buy land within a certain " prohibited zone, except by special permission of the " President of the Republic of Mexico. Accordingly " there was organized a Mexican Company, having a " small capital stock, the same being known as La So- " ciedad de Irrigacion y Terrenos de Baja California " (Sociedad Anonima), always referred to as 'the " Mexican Company'. The title to the 100,000-acre " strip and to the rights to the channel of the Salton or " Carter River (properly the Alamo River), was vested " in this Mexican Company, all of the stock, with the " knowledge of the authorities of Mexico, being owned " by the California Development Company, the directors " of the Mexican Company being all American citizens, " there being, however, a Mexican citizen, resident of " Los Angeles retained by requirement as secretary, and " on whom all papers are served by the Mexican Gov- " ernment."

" *About this time, the California Development Com-* " *pany, in the name of the Mexican Company, was* " *granted by the Republic of Mexico a concession* by " which it was permitted to take 10,000 second feet of " water from the Colorado River, in Mexico, with the " right to carry one-half of that water and such water " as was delivered to it at the boundary line by the " California Development Company, back into the " United States; the other one-half of all such waters

" to be devoted primarily to the irrigation of lands in " Lower California, with permission, however, to carry " into California all of that one-half of the water which " was not needed for use in Mexico." (Trans., pp. 2153-2154.)

The Imperial Water Companies—some times referred to in the record as mutual water companies—were organized by the defendant for the purpose of promoting its enterprise. At the time the contracts were made with the mutual water companies, which contracts are claimed to make them necessary parties defendant here, they, the mutual water companies, were absolutely under the control of the defendant. In effect, the defendant was contracting with itself. (Trans., pp. 1172-1173.)

It is to be borne in mind that the bill of complaint asks no relief against any except the defendant, California Development Company, and that the decree does not purport to affect or bind the rights of any other company. The case does not in any respect involve the construction of any contract or property rights, or, in fact, any other rights of any person or corporation. The only question that the Circuit Court had to consider, and the only question that exists in the case is whether or not defendant, California Development Company, is responsible for the flooding of complainant's land and the destruction of its mines and business. It is the case of a pure tort, in the determination of which it is only necessary to consider whether the defendant has been guilty of doing this injury to complainant. As in the case of all other torts, the liability of the tort-feasors

is joint and several, and one or all, or any number, may be sued, at the election of the person injured.

Lovejoy v. Murray, 3 Wall. 1, 18 L. Ed. 129.

If it were conceded that these other companies were themselves equally responsible for the injury to complainant, appellant cannot object that they were not joined as parties, for appellant is, nevertheless, liable to the whole extent of the injury in the perpetration of which it has unlawfully participated.

If a hundred wrong-doers are concertedly engaged in casting stones at the windows of my place of business, and if they give evidence of their intent to continue their wrong-doing, to the injury of my property and business, can it be that I must learn the identity of each and every one of them and join them all as defendants before a court of equity will grant protection? Is it possible that, if a dozen men are engaged in casting water upon my land and flooding my mill, I cannot get equitable relief against any unless I shall succeed in suing all? Undoubtedly, under such circumstances, every wrong-doer is a *proper* party defendant to any proceeding whether at law or in equity, but that they are all *necessary* parties is a proposition too monstrous to be contemplated.

In the language of Mr. Chief Justice Marshall in

Osborn v. Bank of U. S., 9 Wheaton 739, 843, 6 L. Ed. 204, 229,

since the defendant

> "is responsible for his own act, to the full extent of the injury, why should not the preventive power of

> the court also be applied to him? Why may it not restrain him from the commission of the wrong, which it would punish him for committing?''

And again:

> ''Now, if the party before the court would be responsible for the whole injury, why may he not be restrained from its commission, if no other party can be brought before the court?''

It is the rule in equity, as at law, that in actions *ex delicto* tort-feasors need not be joined.

In

Boyd v. Gill, 19 Fed. 145-146,

Judge Wallace and Judge Brown said:

> ''The right of action in such a case arises *ex delicto* and in equity as well as at law the tort may be treated as several as well as joint,'' citing cases.

In

Hopkins v. Oxley Stave Co., 83 Fed. 912,

the Circuit Court of Appeals for the Eighth Circuit held, in a suit to restrain tortious acts, it was said:

> ''The rule is as well settled in equity as it is at law, that, where the right of action arises *ex delicto,* the tort may be treated as joint or several, at the election of the injured party, and that he may, at his option, sue either one or more of the joint wrong-doers'' (citing cases). ''We perceive no reason, therefore, why the case was not properly proceeded with against the appellants, although numerous other persons were concerned in the alleged combination or conspiracy.''

In

Rocky Mountain Bell Telephone Co. v. Montana Federation of Labor, 156 Fed. 809,

Judge Hunt held the same thing.

The fact that the Mexican Company and the various Imperial Water Companies had contracts with the California Development Company for the purchase of water, cannot affect the question. There is no issue as to these contracts or the construction of them. There is no attempt to decide anything with reference to them. If it be the case that the California Development Company cannot perform its contracts with these subsidiary companies without violating the property rights of complainant, then that result would follow from its own unlawful acts, and not from any direct effect of the decree. If it were necessary to join these subsidiary companies as defendants, it would inevitably follow that all companies and persons, however numerous, must be joined in any suit to restrain a wrong-doer from trespassing upon property, if the suggestion be made that the particular defendant sued cannot perform his contracts with third persons without trespassing upon the property of complainant.

The existence of a rule of procedure so absurd and obstructive was repudiated in

Marker v. Marker, 9 Hare 1.

There a tenant, *under a claim of right (and it is to be noticed that in the present case there is no claim of right on the part of defendant to flood complainant's lands)*

had sold to a stranger a large quantity of timber still uncut and standing on the premises occupied by him A bill was subsequently filed to restrain the vendor from cutting the timber, in order that he might fulfill his contract of sale, *but without making the purchaser a party.* On objection for want of parties, the Court held that the purchaser was not a necessary party (See page 16).

Judge Sawyer says that "this case determines the principle".

See

Cole Silver Mining Co. v. Virginia, etc. Water Co., Fed. Case No. 2989, 1 Sawyer, 470.

See also

Kaukauna Water Power Co. v. Green Bay, etc. Co., 44 N. W. 638.

In

Peoples Tel. & Tel. Co. v. East Tennessee Tel. Co., 103 Fed. 213,

an injunction was asked against the defendant to restrain it from making connections for its patrons with the lines of the plaintiff company. It was objected that the patrons were necessary parties. The Circuit Court of Appeals for the Sixth Circuit, in reply to this objection said:

> "Besides, the defendant is, if the facts be as they appear on this motion, a trespasser, and has no substantial ground for claiming that co-trespassers should be joined with it. The complainant may, if it sees fit, refrain from pursuing them. It owes no duty to the defendant to do so."

In

New York Phonograph Co. v. Jones, 123 Fed. 197,

which was a suit for an injunction, it was held, upon an objection for defect of necessary parties, that

> "The rule is that a person receiving injury from the tortious acts of others has a remedy against one or all of the wrong-doers, and may enforce that remedy against one or all at his election."

It is submitted that there is no rule of administration requiring tort-feasors to be joined in equity any more than at law.

But there is another principle especially applicable to this Court of limited jurisdiction. Neither the Mexican Company nor any of the various Imperial Water Companies could be brought into the Circuit Court without defeating the jurisdiction. The Mexican Company is, as its name denotes, a Mexican corporation, and the various Imperial Water Companies are California corporations.

Revised Statute, Section 737, provides:

> "When there are several defendants in any suit at law or in equity, and one or more of them are neither inhabitants of nor found within the district in which the suit is brought, and do not voluntarily appear, the court may entertain jurisdiction, and proceed to the trial and adjudication of the suit between the parties who are properly before it; but the judgment or decree rendered therein shall not conclude or prejudice other parties not regularly served with process nor voluntarily appearing to answer; and non-joinder of parties who are not inhabitants of nor found within the district as aforesaid shall not constitute matter of abatement or objection to the suit."

And the *47th Equity Rule* further provides:

> "In all cases where it shall appear to the court that persons, who might otherwise be deemed necessary or proper parties to the suit, cannot be made parties by reason of their being out of the jurisdiction of the court, or incapable otherwise of being made parties, or because their joinder would oust the jurisdiction of the court as to the parties before the court, the court may in their discretion proceed in the cause without making such persons parties; and in such cases the decree shall be without prejudice to the rights of the absent parties."

Most clearly, even if it could be held that the subsidiary companies were under the general rules of equity procedure necessary parties with respect to the subject matter of the present suit, yet they cannot be deemed indispensable parties. Nothing is alleged against them; nothing is asked from them. No property, contract or other rights of theirs are construed or determined.

In

Cole Silver Mining Co. v. Virginia, etc. Water Co.,
Fed. Case No. 2989; 1 Sawyer 470,

there were contracts and property rights to be construed, for the trespass was there committed under a claim of right. Nevertheless, Judge Sawyer held:

> "Upon the omission of Glauber the court would have jurisdiction over all the other parties, and their rights as against the complainant, may be determined without his presence. The acts complained of are tortious, and the cause of action is several, as well as joint. I do not think Glauber an indispensable party to the action. While the decree will finally settle the rights of the parties before the court, it will not bind him, and he may still litigate

his claim with the complainant in another action, or he may voluntarily appear in this; for it is not to be presumed that he is in fact ignorant of the pendency of the suit. If Glauber is an indispensable party, it will be impossible for the court to restrain the commission of waste; the working or destruction of a mine; the diversion of water; the flooding of an upper riparian proprietor; or the erection or continuation of any nuisance, however offensive, dangerous, or destructive to the rights of another, when the wrong-doer has an associate or confederate residing out of the jurisdiction of the court, or when the tort-feasor himself keeps beyond the jurisdiction of the court, and performs the tortious acts through his agents and servants. It is notorious, that in the mining regions of Nevada, Oregon and California, and all the mining territories, many trespasses and wrongs of the kind mentioned, requiring the almost daily interposition of the courts, are perpetrated by parties having associates residing in other states. To deny relief against wrong-doers in such cases in this circuit, on account of the absence of one tort-feasor, would be to paralyze the right arm of the court in those cases wherein its effectual interposition is most imperatively demanded, and most frequently invoked. Let it be once established that the courts cannot interfere, or grant relief in the absence of one of the joint tort-feasors, and the mining interests of all the gold and silver producing states will, thereafter, be at the mercy of any bad men, who, relying upon a confederate beyond the jurisdiction of the court to enable them to evade all redress for injuries committed, may choose to combine for the purpose of wrongfully availing themselves of the labors and discoveries of others. In my judgment, in such cases it would be far more equitable to compel the absent tort-feasor to appear and defend his right, or submit to any inconvenience that may incidentally result from the execution of any decree entered against his co-trespassers, rather than deny all re-

dress, no matter how grievous, to the injured party, because one of the wrong-doers withdraws and keeps himself beyond the jurisdiction of the court. In the one case the absent party may appear and have his rights adjudicated, if he so desires, and justice will be awarded to all; while in the other, the most grievous injuries must necessarily go wholly unredressed.

"For example, can the courts of the United States properly refuse to redress clearly manifest injuries to its own citizens, by restraining the working of a gold or silver mine, waste, or the erection or continuance of a nuisance, because a citizen of Great Britain, residing in England, is interested in the profits of the wrong, or himself, safe in his retreat beyond the jurisdiction of the court, perpetrates it by means of his agents, servants and employees? The court, in such instances, must, from the necessity of the case, assume jurisdiction and proceed to a decree as to the parties before it, or sit helplessly by and permit an absolute failure of justice, by suffering our own citizens to be ruined with impunity by irresponsible, non-resident wrong-doers, or by parties in collusion with them.

"On this principle of preventing a failure of justice, and even on grounds of convenience, courts of equity have often dispensed with parties interested in and affected by the suit, in cases calling far less loudly for such action, than the class of cases to which this belongs. Smith v. Hibernian Mine Co., 1 Schoales & L. 240, 241; Rogers v. Linton, Bunb. 200, 201; Attorney General v. Baliol College, 9 Mod. 409; Thompson v. Topham, 1 Younge & J. 556; Cockburn v. Thompson, 16 Ves. 326; Williams v. Whinyates, 2 Brown, Ch. 399; Wallworth v. Holt, 4 Mylne & C. 635, 636; Taylor v. Salmon, Id. 141, 142; Harvey v. Harvey, 4 Beav. 220-222; Reynoldson v. Perkins, 2 Amb. 565.

"In my apprehension, it is no good answer to say, that the injured party may have his remedy in the state courts, where service may be had on non-resi-

dent defendants by publication of summons. The constitution and the laws entitle parties in certain cases to seek redress in the national courts, and the class of cases mentioned, is the very one in which the remedy in the national courts is most valued by litigants, and in this circuit most frequently sought. Besides, it is a mere accident if the state laws admit of acquiring jurisdiction in this mode. I doubt whether many of the states, if any, east of the Rocky Mountains, authorize a publication of summons at all, in that class of cases. If they do, when an action is commenced in a state court by a citizen of the state, and all the defendants are citizens of another state or foreigners, it is their absolute right to have a transfer to the national courts, and a transfer by the defendants served in the state would oust the jurisdiction, if any defendant should be a non-resident; for, in the national courts service by publication could not be recognized. Thus there would still be an evasion of the remedy and a failure of justice.

"To my mind there is an obvious distinction between torts of the class to which this action belongs, wherein the injury and right of action are several as well as joint; and actions of partition, for the canceling of contracts, settlement of partnership affairs, and the like, wherein the decree is not binding even on the parties before the court in the absence of a party in interest. Such were the cases of Shields v. Barrow, 17 How. (58 U. S.) 139, and Barney v. Baltimore City, 6 Wall. (73 U. S.) 280.

"In Marker v. Marker, a tenant under a claim of right, had sold to a stranger a large quantity of timber still uncut and standing on the premises occupied by him. A bill was subsequently filed to restrain the vendor from cutting the timber, in order that he might fulfill his contract of sale, but without making the purchaser a party. On objection for want of parties, the court held that the purchaser was not an indispensable party. 9 Hare 1, 5, 12,

16. This case determines the principle, for the decree must necessarily have affected the rights of the purchaser of the timber.

"Had Glauber's name been omitted there could have been no question as to jurisdiction, and he has not been brought within the jurisdiction of the court by service or appearance. My impression is that the jurisdiction is not ousted by merely naming him in the bill when it appears that he cannot be served. Glauber himself is not present to make, and he does not make, the objection to the jurisdiction, and the other parties who do raise the objection are in no way affected by his absence, or by his being named in the bill. But, however that may be, since he might have been omitted in the first instance to prevent an ouster of the jurisdiction as to the other parties, I see no reason why the bill may not now be amended, before he is brought in, by omitting his name for the same purpose, without prejudice to the motion for an injunction; and the complainant asks leave to amend. I can perceive no good reason why leave should not be granted."

For a further reason neither the Mexican Company nor the Mutual Water Companies can be considered necessary parties. Upon consideration of the evidence, Judge Wellborn found that

"said companies were organized by the defendant and are now acting as instrumentalities for effectuating the diversions complained of, and should be considered, for the purposes of this suit, as identical with defendant, or, if necessary to avoid technical objections, as mere agency corporations."

Trans., Vol. I, page 128.

Appellant does not dispute the facts in this regard (Brief, pages 76-92), but contends that the fiction of

separate corporate entity will close the eyes of a court of equity to the facts as they are. Now it is not denied, nor can it be successfully denied, that defendant is in absolute control of the Mexican Company. It also organized all the Mutual Water Companies as agencies to facilitate the sale of the water diverted by it. Against its will and without its direction, none of the injuries complained of could have been done. The independent investigations of the Government are to the same effect as the conclusion reached by Judge Wellborn. The money of the directing company, it has been forcibly said,

> "was not used in permanent development, but apparently disappeared either in profits to the principal promoters or in the numerous subsidiary companies, which to a certain extent fed upon the parent company, or served to obscure its operations, such as a construction company, a company to promote settlement, and a company to handle the securities of the various other corporations. The history of these deals is so complicated that it would require careful research, extending through many months, to unravel the devious ways by which money and valuable securities have disappeared. In brief, it is sufficient to state that the valuable considerations which were received for water rights were obviously not used in providing necessary and permanent works for furnishing water to the settlers."
>
> Senate Document No. 212; Trans., Vol. V, page 2089.

In view of the admitted facts can a wrong-doer, after having committed the most disastrous act of negligence of which there is record or tradition, be heard to say

that a decree against it can not be allowed to stand, because certain subsidiary corporations, organized by itself, were not made parties to the suit? And this, too, when the Court can not get jurisdiction over the subsidiary corporations?

The fiction of separate entity, like all other fictions, is a legal device invented for the purposes of justice. Will not that fiction be brushed aside and disregarded when the ends of equity require?

In

Anthony v. American Glucose Co., 146 N. Y. 407,

the New York Court of Appeals said:

> "We have of late refused to be always and utterly trammelled by the logic derived from corporate existence where it only serves to distort or hide the truth."

But, if the fiction be so opaque that truth cannot be discerned through it, and a court of equity can not see that for the purposes of this suit the defendant is *identical* with its subsidiary companies, can not the subsidiary companies, without violence even to a fiction, be deemed mere agents of the defendant? Surely a corporation may act as agent of another. *Qui facit per alium facit per se;* and if, as is admitted (Appellant's Brief, page 85), the subsidiary companies were formed for the purpose of assisting in the transaction of the business of the parent company to facilitate its operations in the settlement of the country and the distribution of water, then they must bear to the parent company the relation of agent to principal.

In

Hunt v. Davis, 135 Cal. 34,

it is said:

> "The case, we think, comes directly within the authority of Shorb v. Beaudry, 56 Cal. 450, and other cases following that decision. *'The corporation was formed as a mere agency for the more conveniently carrying out the agreements' of the parties;* and the relation sustained by it to them is 'substantially, if not technically, that of trustee' And, as in the case cited, it must be held that 'substantial justice can be administered in this case by treating the parties in the light of the agreements between themselves, independently of their incorporation, and in no other way'. (Shorb v. Beaudry, 56 Cal. 450, and Charter v. San Francisco etc. Co., 19 Cal. 247, there cited. Cornell v. Corbin, 64 Cal. 200; Kohl v. Lilienthal, 81 Cal. 397; Behlow v. Fischer, 102 Cal. 214-215)."

And in

Negaunee Iron Co. v. Iron Cliffs Co., 96 N. W. (Mich. 1903) 468,

in which an injunction was asked against certain individuals to restrain threatened trespasses upon mining property, the individuals claiming a right under a lease to the Pioneer Iron Company, it is said:

> "It is also urged as a fatal objection to the maintenance of the bill that the Pioneer Iron Company is not made a party. Under the allegations of the bill, as well as under the proofs, the Pioneer Iron Company is used as a 'dummy' for the benefit of the defendant companies. The defendants owned, and have owned for many years, all its capital stock, its furnaces and property, both real and personal. They have managed all its affairs, and for their

> own benefit. * * * Admitting that the Pioneer Iron Company is not a dead corporation, yet all its property, franchise, and rights are owned by the defendant companies, so far as the rights under the 99 year lease are concerned, *and are fully represented by those now before the court.*"

Clearly agents need not be joined.

22 Cyc. 915.

THE ACCOUNT OF DAMAGES WAS PROPERLY TAKEN AS OF THE TIME OF THE DECREE.

It has already been seen that at the time of instituting the suit in the State Court, and at the time of filing the remodelled bill in the Circuit Court, the flow of water upon complainant's property was continuous. Only a portion of the damage had then been done. Thereafter the damage continued to increase. At the time of the filing of the complaint in the State Court $87,000 of damage had been inflicted. At the time of the decree in the Circuit Court, the damage, growing day by day and hour by hour, had reached $456,746.23. Were we required to institute a new action every day while waiting for an injunction? Appellant so contends.

The first principle and highest merit of equity is that, by its decree, complete justice is done between the parties and litigation finished. If that principle had not been applied by Judge Wellborn to the present case, it would have been necessary to try the issues again in an action at law, *to recover for the damage done subsequent to the institution of the suit and prior to the issuance of*

the injunction. Such is equity in the view of counsel for appellant.

In

Providence Rubber Co. v. Goodyear, 9 Wall. 788; 19 L. Ed. 566,

it was held that

> "In taking the account the master was not limited to the date of the decree. In such cases, it is proper to extend the account down to the time of the hearing before him, unless the infringement had ceased prior to that time. The rights of the parties are settled by the decree, *and nothing remains but to ascertain the damages and adjudge their payment. The practice saves a multiplicity of suits, time, and expense, and promotes the ends of justice. We see no well founded objection to it.*"

In accordance, therefore, with the practice of equity, we believe that it was unnecessary to file supplemental bills showing the damage done subsequent to the institution of the suit. But out of an abundance of caution the supplemental bills were filed.

In

Foote v. Burlington Gaslight Co., 72 N. W. 755

it was held (see page 756):

> "1. Why not permit damages since the beginning of an action to be claimed in a supplemental petition, when of the same nature, and occasioned by the same cause? The nuisance was a continuing one. Had no supplemental petition been filed, another action could have been maintained for the damages therein alleged. But, if the original action had been dismissed, the plaintiff might well have claimed, in a new petition, damages for the entire period, and no one would contend two causes of action were

stated. It follows, then, that the original and supplemental petitions, when read together, state but one cause of action, and the relief sought is only enlarged. The true criterion for determining the propriety of a supplemental petition does not lie in ascertaining whether it states a cause of action which might be independently maintained. If it may be read with the original petition, and both considered as one pleading, and if its scope is limited to strengthening, developing, or re-enforcing the original cause of action, or of enlarging the extent of or changing the relief sought, then it meets the very purpose of such a pleading. Leach v. Association (Iowa), 70 N. W. 1090. The new cause of action which the law will not permit to be thus pleaded is one not related to that stated in the original petition, and which, under the rules of pleading, must be set up in a separate count or division. It is the policy of the law to grant relief as far as possible, for all wrongs complained of growing out of the same transaction, and thus put an end to litigation. Childs v. Railroad Co. (Mo. Sup.), 23 373; Richwine v. Presbyterian Church (Ind. Sup.), 34 N. E. 737; Boone, Code Pl., Sec. 40. It was held in Childs v. Railroad Co., supra, that a continuance of the same grievance after the commencement of the suit might be pleaded by way of supplemental petition. See Buckley v. Buckley, 12 Nev. 423; Phil. Code Pl., Secs. 317, 318. No good reason has been suggested for not disposing of this entire controversy between these parties in one action, and we think the ruling of the district court in permitting the supplemental petition was correct."

THE COURT DID NOT ERR IN DECIDING THAT THE FLOODING OF SALTON SINK AND THE DESTRUCTION OF COMPLAINANT'S PROPERTY WAS OCCASIONED BY THE NEGLIGENCE OF THE CALIFORNIA DEVELOPMENT COMPANY.

It is an admitted fact—and we use the word "admitted" in the sense that the testimony is all one way on the subject— that the works and property of the complainant in what is called Salton Basin were destroyed during the years 1904 and 1905. There is no controversy as to the discharge into Salton Basin of a very large quantity of water, nor is there any dispute regarding the destruction of the works of complainant by that water.

The question which was determined by the Court below was, through whose fault did the water get there? According to the admissions of the defendant's witnesses enough water to work the destruction of complainant's property reached Salton Sink through the intakes constructed by defendant. There is no testimony in the record which shows, with any degree of satisfaction, that during the years 1904 and 1905 any water reached Salton Sink, except through the intakes constructed by the defendant. It is true that some of defendant's witnesses did testify that water would have reached Salton Sink whether defendant's intakes had existed or not, but we think we are well within the record when we say there is nothing to show that any water actually reached the sink during the years 1904 and 1905 except water which came from Colorado River through the intakes of the California Development Company.

Mr. Schuyler, one of defendant's witnesses, said that he had been at the intake when the entire flow of the river was passing through it, and that at that time the discharge into the canal was probably 25,000 second feet. He said he had been there several times when that condition existed. (Trans. of Record, pp. 1339-1340.) The same witness stated that if there had been a headgate at the intake, the entire 25,000 cubic feet would have gone down the river instead of going into the canal. (Trans. of Record, p. 1341.)

Mr. Cory was asked: "From your knowledge of the "existence of an open channel from the Colorado River "extending down to Imperial Valley, and from your "knowledge of the topography of the country including "Imperial Valley and the Salton Sink, and assuming "there was sufficient water discharged in 1904 to engulf "the salt works, what was the cause of it?" (the word "engulf" was explained to him to mean to surround the salt works), and he answered, "Well, assuming that "there was an open channel from the Colorado River "leading to the Imperial Valley of a sufficient capacity, "and leading from the channel into the Salton Sink, I "would say the open channel would be the cause of it." (Trans. of Record, p. 1745.)

"Q. From your examination of the situation, your "examination of these records, the gauge records, is "it not in your opinion an indisputable fact, assuming "Salton Sink to have filled with water in 1904 to such "an extent as to engulf the salt works, that that flood "was due solely and entirely to the existence of that

" channel leading from the Colorado River to the Im-
" perial Valley?

" A. So far as these records are concerned, that " would be the natural assumption." (Trans. of Record, p. 1746.) Of course, Mr. Cory had nothing but the record.

" Q. Taking into consideration the fact that the " channel existed in 1904 communicating between the " Imperial Valley and Colorado River, and that two in- " takes leading to that channel were open, can any " plausible explanation be afforded for the discharge " into Salton Sink in 1904 of sufficient water to engulf " the salt works except the existence of that channel?

" A. It might be, but it would be improbable." (Trans. of Record, p. 1749.)

Mr. Cory could not find any explanation for the discharge into Salton Sink in 1904 of sufficient water to surround the salt works, except the existence of the canal leading from Colorado River to Imperial Valley, the head of which canal at the Colorado River was open. He also said (Trans. of Record, pp. 1780-1781): "The " fact that from the early part of 1905 a large portion " of the flow which but for this cut would have gone on " down the river flowed into the cut instead of down the " river had an effect upon silting the river below. It " materially raised the bed of the river for a distance " of two miles. That naturally decreased the amount " of water going down the river and increased the " amount going towards the sink through the canal." He said it was his opinion, from what he knew of the

subject, that Salton Sink might have been flooded to such an extent as to destroy the works of complainant *without one drop of overflow water having reached Salton Sink from Colorado River.* He admitted that he could not tell what proportion of the water that found its way into Salton Sink came from the intakes at times when there was no overflow. (Trans. of Record, pp. 1785-1786.)

As has been said, the record is silent with reference to any showing that any of the overflow water reached Salton Sink in the years 1904 or 1905.

According to Water Supply and Irrigation Paper No. 177, there were two and three-fourths times as much water taken into the Imperial Valley in 1905 as was used for irrigation.

Mr. Rockwood says (Trans. of Record, p. 1347): "There was no flood condition in the year 1904 after "June or July—not enough to overflow the banks of the "river."

"We had very heavy rains in February and March, "1905. Prior to that we had heavy rains during Aug-"ust, 1904, and a heavy flood coming from the natural "overflow down the New River during that summer. I "believe there was but one heavy storm in August.

"Q. Do you tell us seriously you think Salton Sea "was caused by that storm?

"A. Caused by that storm and by flood waters com-"ing down the New River.

"Q. What flood had occurred subsequent to August, "1904, and up to December, 1904, that could have re- "sulted in flooding Salton Sink?

"A. The summer floods of June and July. I do not "know when the water reached Salton Sink and I do "not know the duration of the summer floods of 1904." (Trans. of Record, pp. 1358-1359.)

"I have never heard that Salton Sink was flooded in "1903, and I knew the water was higher in 1903 than in "1904.

"Q. If it was the flood of 1904 that flooded Salton "Sink, why didn't it flood in 1903 when the water was "higher?

"A. My recollection is that there were no heavy "rains in 1903. The only heavy rain I can get any rec- "ord of is the one of August, 1904, and that was a pre- "cipitation of about 2 inches." (Trans. of Record, pp. 1360-1361.)

He further says (Trans. of Record, p. 1361): "I "seriously attribute the presence of a large amount of "water in Salton Sink to that storm. I think storms "are partially responsible for the flooding of the plain- "tiff's property. The rest of the responsibility is par- "tially upon the flood waters coming down the Alamo "and New River, partially upon the natural seepage and "drainage from the irrigated lands.

"Q. What else? Is that all?

"A. It is probable that some waste from the canals "of the California Development Company.

"Q. It is probable. That is only a probability, is it?

" A. The waste water alone never could have reached " Salton Sink. If the storm of August took place over " the Sink the water would have gotten there imme- " diately."

Transcript of Record, p. 1362 he said: "I don't " think I told you I attributed Salton Sea entirely to " that storm. It might have taken those storm waters " only two or three minutes to reach the Salton Sink. "Assuming the storm had been what I think it was, I " suppose it would have taken three or four days for the " water to reach Salton Sink. I did not hear of any " water in Salton Sink in August, 1904, or in Septem- " ber, 1904. I don't know anything about water in " Salton Sink until November, 1904, I heard the water " was approaching the salt works. There was no water " overflowing the banks of the river after July, 1904, so " far as I know. It is not conceivable that if the flood " ceased by the 1st of July, 1904, it would have taken " until the latter part of 1904 for the water to reach the " Salton, but the south end of the Sink would neces- " sarily fill to a considerable extent before the waters " would go farther north towards the salt works."

Transcript of Record, p. 1405-7: "I first saw water " in Salton Sink while passing on the railroad. It had " been charged that the defendant was responsible for " the presence of that water. I don't know of any water " that could have reached Salton Sink after November, " 1904, and up to January, 1905, except water which we " were diverting from Colorado River."

Mr. Rockwood said he was very familiar with conditions which prevailed in that country. He claimed to be very familiar with all the water courses leading to Salton Sink. He was engaged in the business of diverting water. He knew that it had been charged that his company was responsible for the gathering of water in Salton Sink, and yet admitted that he knew of no water which could have reached Salton Sink between the dates named, except water which was diverted by his company from Colorado River.

This admission, taken in connection with the other uncontradicted testimony in the record, is entirely sufficient to warrant the conclusion of the Court that complainant's property was destroyed through the negligence of defendant.

Referring again to Rockwood's testimony (Trans. of Record, p. 1407) he was asked: "Is it not your opinion, " and are you not positive that if, after being notified in " November, 1904, that Salton Sink was filling, you had " absolutely cut off the diversion of water from the Colo- " rado River, the salt works would not have been flooded " in the latter part of 1904 or early part of 1905?

" A. I do not know that to be absolutely the case.

" Q. You haven't any doubt about that, have you?

" A. There was water coming down New River and " the Volcano Lake was coming down, I know, some time " during the winter and spring of 1905. No flood con- " ditions prevailed during the fall of 1904 and up to " January, 1905. I think I was advised in December, " 1904, that the salt works were being ruined. There

" had been no flood conditions up to that time. There " had been no overflow since the summer floods. The " summer floods may have subsided, but at the same " time the flow might have been longer than that from " New River and the Alamo.

" Q. That is speculation, isn't it?

" A. I don't remember whether it was the case this " time or not. I knew the salt company was charging us " with the responsibility for the waters in Salton Sink.

" Q. Now, then, knowing that, and having it in your " power to ascertain positively whether or not it was " the waters which you were diverting at that time, you " did not make any effort to ascertain the fact?

" A. As I explained before, at the time when this " was brought to my attention we most assuredly were " not turning a sufficient amount of water, waste from " our canals, to injure the salt works. So I believed. " My recollection is that the government records do not " show that we were wasting water in 1904. I am not " aware of the fact that the government records show " that the loss in October, 1904, was 502 second feet." (Trans. of Record, p. 1409.)

This witness was the chief engineer of the defendant's enterprise. According to his statement, he had made it his business to study these government records very carefully, very industriously, and he did not know, until he was confronted with the fact upon the stand, that the government records for October, 1904, showed that his company was wasting 502 second feet per second into Salton Sink. We only cite this as one illustration show-

ing his inaccuracy and unreliability in estimating and determining the amount of wastage discharged by the defendant. It is true he said later that his estimate of the waste was simply an estimate, that it was not based upon actual measurement. He does say (Trans. of Record, p. 1412): "In estimating the amount of waste from "the canals of the California Development Company the "government engineer is measuring the flow of water "at Rockwood and Brawley in the New River and the "Alamo. They were measuring the wastage from all "sources.

"Q. In October, 1904, there was no water coming to "that part of the country, except through the system of "the California Development Company, was there?

"A. Quite so; but we had nothing to do with the "water after we had given it to the water companies."

Admittedly defendant was diverting a large quantity of water and taking it to a region from which if not used, it must inevitably flow into Salton Sink. How much water defendant was diverting, its own records, or at any rate the records disclosed by it, do not show. The government records show that it was carrying towards Salton Sink a very much larger quantity of water than was needed, or at any rate than was used for irrigation or for any other beneficial purpose. It will probably not be disputed as a proposition of law that if defendant was carrying to Imperial Valley very much more water than was needed for irrigation and that Salton Sink did fill with water, and no other reason can be assigned for the presence of the water in the Sink

than the diversion by the defendant, and, indeed, if the chief engineer of the defendant cannot tell of any other water which could have reached Salton Sink than the water diverted by his company, then certainly a prima facie case was made that the presence of the water there was due to the act of defendant.

Mr. Rockwood said he could have prevented the diversion of more water than was needed for irrigation (Trans. of Record, p. 1414), and was asked:

" Q. Did you in this case?

" A. I don't think that at that season of the year, in " October or November, we were diverting much more " than we really needed. I do not believe we were " diverting five hundred or odd cubic feet per second, " unless it was immediately after a rain, that is, divert- " ing it into Salton Sink. It would take several days " to shut water off at the river, and immediately upon the " rain stopping the Imperial Water Companies would de- " mand that we turn the water back into the canal or " river. They shut off their supply at once. *We had no* " *means of cutting off the supply from the river, so we* " *necessarily had to let just as much water in when there* " *was a rain as when there was no rain, and when they* " *did not need the water for irrigation it would go into* " *New River and the Alamo, and from there into Salton* " *Sink, and thus get so much closer to the salt company's* " *property. I knew that at the time the water was being* " *turned in.*

" Q. Your concern all the time was to have a full " canal without regard to whether the people took it out " for irrigation or not?

"A. My concern was simply to get a sufficient "amount of water there for the people. It wasn't par- "ticularly to have a full canal. My instructions to the "men at the headworks were to keep the canal open." (Trans. of Record, pp. 1414-1416.)

His attention was called to the fact that on the 15th of October, 1904, his company diverted 1976 cubic feet per second, and he was asked what was the occasion of the diversion of that quantity of water at that time, to which he replied (Trans. of Record, pp. 1417-1419): "If there was that amount diverted, it was on account "of the rise in the river undoubtedly. That all went "into Salton Sink with the exception of the amount we "were using for irrigation.

"Q. If you diverted 900 cubic feet and lost 200 feet, "that would mean a need for 700?

"A. A need for 700 feet.

"Q. I will ask you whether your average consump- "tion for January, 1905, exceeded 328 second feet?

"A. It would be necessary for me to refer to the "records at Calexico before I could reply to that.

"Q. If you have any records that show that you "used more water than that, we would like to have "them. Also whether you have any records that will "show that your average consumption for February "was more than 268 second feet, for March 265 second "feet and for April 682 second feet.

The respective figures named in this question were the quantities shown by the government records to have been consumed. It is worthy of comment that the de-

fendant did not produce any records showing its consumption during the months named to be any greater than the quantities stated in the government records.

His attention is again called to the government record and the statement made to him that "according to this "government record the average diversion (into the in- "take of the defendant) from May 8 up to and including "September 17, 1904, was about fourteen or fifteen hun- "dred second feet", and he was asked how many second feet he was using during those months:

"A. The major portion of the water was carried off "through the waste gate." (Trans. of Record, p. 1422.)

"Q. Were you at the waste gate at all from the 8th "of May to the 17th of September, 1904?

"A. I can't give you any dates now. I know there "was water wasted through the gate between the 8th "of May and the 17th of September, 1904, otherwise it "would have come down to the canal at Calexico, and it "didn't come." (Trans. of Record, p. 1424.)

At another time he testified that the flat country in front of the waste gate had been filled up so that the outlet of that gate was practically ineffective except during periods of very high flood.

And again he said that he knew the water didn't get to Calexico because he measured the water at Calexico and also measured the water that was coming in at the heading. If any such measurements were made they should have been in the possession of defendant and should have been produced at the trial, but notwithstanding the urgent and insistent demand of complainant that

they be produced, no such measurements were forthcoming. The witness said that it was questionable whether the measurements had been preserved and the question arises, if taken, why were they not preserved? What was the motive for their destruction?

The failure of the defendant to produce accurate measurements showing the quantity of water which it diverted and the quantity which it wasted into Salton Sink is one of the most suspicious circumstances connected with the case. It is almost incredible that the management of an enterprise of this character would not preserve measurements showing the discharge into its canal from day to day, as well as measurements of the quantity of water which it was selling. These two facts, if correctly shown, would have been of great aid in determining the quantity of water which defendant was wasting and which eventually found its way into Salton Sink. What is the reason that those measurements, if preserved, were not produced? Probably because they would have demonstrated beyond the shadow of a doubt, the truth of the statement of Mr. Meserve to the Secretary of State at Washington when he was appealing to him to prevent the Republic of Mexico from revoking the permit which it had given to the California Development Company.

Rockwood says (Trans. of Record, pp. 1425 and 1205): "We kept the flow at Sharp's, also the flow of water "through the waste into the Alamo. I paid no partic- "ular attention to the amount of water which was "wasted except when there was a shortage of water.

" If we were short of water, I attempted to prevent " waste."

When the canal was running bank full, when it was filling Salton Sink to the detriment and injury of complainant, he paid no attention to it. It was no concern of his. But when there was a shortage of water, he attempted to prevent waste. When the business of defendant was likely to be interfered with, when its income was likely to be lessened, then its chief engineer intervened to prevent any more waste taking place than was absolutely necessary, but when there was sufficient water to answer the needs of the irrigationists in Imperial Valley, he gave himself no concern about the quantity of waste.

We made a further attempt to get some information about the measurements of flow preserved by the defendant and asked Mr. Rockwood (Trans of Record, p. 1425):

" Q. Who took those measurements of water from " the waste way into the Alamo?

" A. They have been—if there was any water flowing " through the waste into the Alamo, they would have " been taken probably by—might have been taken by " our watchman at Sharp's, or by the head zanjero."

Would it be possible to present a better example of equivocation than is given in this answer? He first made the positive statement that measurements had been taken, that they had been taken under his direction, but it was questionable whether they had been preserved, and when asked by whom they were taken he made the lucid answer which we have just quoted.

And again he says (Trans. of Record, pp. 1425-1426): "Measurements were undoubtedly taken. What we "called our waste way at Sharp's wasted into the "Alamo, which water was taken out at a point farther be- "low for irrigation into the Rose system. We call that "a waste way. We have some measurements of water "wasted from the canal system which did not get back "into it. Whether we have a perfect record I cannot "tell. I think not. These measurements were taken "by employees of the defendant under my instructions "for the purpose of preserving at least a partial meas- "urement for general information. I wanted to know "and I found out."

However, the witness if he did find out failed to inform the Court of the result of the measurements or any information derived from them.

Again he says (Trans. of Record, pp. 1426-1428): "I wanted to know afterwards how much water was "being discharged into Salton Sink. Think we had "measurements made in November or December to de- "termine how much water was being discharged. Those "records have not been produced because they were not "asked for and they are not in my charge at present. "I was asked on direct examination what the wastage "was.

"Q. And you knew at that time that your company "had preserved records showing the wastage through "certain waste gates, did you?

"A. I think for the latter part of that season through "what is called main wasteway for Imperial Canal No.

" 1, that is the main canal that was referred to in the " previous evidence—by the latter part of the season " I mean the latter part of 1904.

" Q. Those measurements were preserved by you, " were they, in anticipation of a claim by the New " Liverpool Salt Company?

" A. No, not with that anticipation. They were " taken after I knew the salt company had charged " that my company was responsible for this overflow. " With reference to those measurements, I simply re- " member that they varied very greatly. I don't know " what the maximum wastage was after I had been in- " formed of the salt company's claim. After being in- " formed that the complainant charged us with the re- " sponsibility of flooding its works, we did at times dis- " charge water that we knew flowed into Salton Sink.

" Q. *And you diverted it from the river knowing it* " *would flow in there?*

" A. *I couldn't help but do it.*

" Q. Why couldn't you help it?

" A. Because we could not close the intake in time " to prevent it from reaching Sharp's. I believe it was " in December, 1904, I was notified of this claim of the " salt company."

During all of the time that the injury was being suffered by complainant, Rockwood was the chief engineer of the defendant and practically in entire charge of its operations.

What was the condition prevailing in 1904 or up to the 1st of February, 1905, that would have prevented the

defendant from closing not only one but all of the three intakes? There is absolutely nothing in the record that can be suggested as an excuse for its failure to shut off the water when it was notified that the property of complainant was being seriously endangered by the accumulation of water in Salton Sink.

Rockwood says (Trans. of Record, p. 1428): "I be- " lieve it was in December, 1904, that I was notified of " the claim of the Salt Company" (that is, that the defendant was responsible for the discharge of water into Salton Sink). "There had been no flood up to that time " that would have prevented us from closing the intake.

"Q. Why, then, could you not close it and stop the " discharge of water onto the salt company's property?"

Bear in mind in connection with this that the witness said that the only water which was finding its way to that part of the country at that time was water which defendant was diverting from Colorado River. Now, mark his answer.

" A. The indications were from the state—from the " history of the river, that the trouble with the Califor- " nia Development Company would be an insufficiency " of water within a very few days. My recollection is " that I first received notice of the water in Salton Sink " in November, 1904. I did not at that time make or " cause to be made any investigation to ascertain the " source from which the water in the Sink came. I " knew from general reports or rumor that the salt " company was blaming the irrigation company for the " water in the Sink. I knew this as early as November

" or December, 1904. I didn't believe we were respon-
" sible." (Trans. of Record, pp. 1428-1433.)

" Q. And you didn't make any effort to ascertain
" what the fact was?

"A. I knew we were wasting at that time but a very
" small amount of water anyway, and that was the
" only water with which we could be charged.

" Q. How long did you continue to make measure-
" ments of the water which you were wasting into
" Salton Sink after you had been notified that the com-
" plaint charged you with the responsibility for the
" filling of the Sink?

" A. Why, I cannot answer that. I suppose that
" the measurements at certain wastes would have been
" kept up, intermittently at least.

" Q. And those measurements were made for the
" purpose of knowing how much water you were dis-
" charging and which eventually found its way into
" Salton Sink?

"A. They were made for the purpose of knowing
" how much water we were wasting. The waste waters
" undoubtedly found their way into Salton Sink unless
" they were lost by evaporation or seepage before it
" reached there. Whether they increased the size of
" Salton Sea depends upon the amount of waste.

"Q. *Then according to you, it was absolutely neces-*
" *sary, as one of the elements of that system, that you*
" *should continue to divert a full head of water at all*
" *times, and that whenever natural irrigation happened*
" *to come, there was nothing for you to do with the*
" *water but to dump it into Salton Sink?*

"A. We didn't dump it.

"Q. What?

"A. *We didn't necessarily dump it.* It was dumped "by the Mutual Water Companies. When we turned "it over to the Mutual Water Companies, we had no "right to ascertain whether they could make use of it "or not. *We could either turn the water over to the "Mutual Water Companies, or into the Alamo or New "River. If we didn't happen to have need for the "water, we did one of two things, turned it out of the "waste gate into the Alamo, or the Mutual Water Com- "panies turned it out of their waste gate to flow into the "Salton Sink."* (Trans. of Record, pp. 1433-1437.)

There was an adjournment at this stage of the testimony of the witness, and when the session was resumed, he was asked whether he had produced the records of the defendant or any of its subsidiary companies showing wastage into Salton Sink, and he replied:

"I have produced all of our original records. I "have not as yet had time to go through these records "and obtain final results. I have a paper from Calexico "showing waste at the point called Five Gates, which "was the principal wasteway into New River. The "records of the waste into the Alamo would have to "be compiled from original zanjero measurements "which would take a very considerable length of time. "There is only one point at which defendant has wasted "water into the Alamo." (Trans. of Record, pp. 1527-1528.)

That is substantially all of the information which we were able to derive from the defendant with reference to records of measurements preserved by it or its employees.

He was asked (Trans. of Record, p. 1531) whether he had delivered more water to the Imperial Water Companies than the irrigationists were demanding, to which he replied:

"A. *We may have done so at times.* Water Com-
" pany No. 1 has a waste way running to the north of
" Mesquite and emptying into the Alamo. During the
" year 1905 it was necessary for us to carry through
" the waste ways in the neighborhood of Calexico all of
" the water from the Colorado River, and inasmuch
" as our effort to close intake No. 3 had been unsuc-
" cessful, there is no doubt but that the amount of water
" which was passing through our waste ways would
" have reached the salt works in that year.

" Q. *In other words, there was water enough com-*
" *ing down your canal which you could not use for any*
" *beneficial purpose to create a sea large enough to reach*
" *and envelop the salt works in 1905?*

" A. Yes sir." (Trans. of Record, pp. 1531-1536.)

Again the witness said (Trans. of Record, pp. 1591-1592): "There was no flood water from the river in
" October and nothing to make any discharge from Vol-
" cano Lake, New River or the Alamo, and the same
" is true of November and December, 1904."

The witness also testified (Trans. of Record, p. 1537) that the defendant was selling water to the Holtville

power plant under an arrangement by which the defendant was to get $2 per month per horse power, and that the greater the power the greater the income of defendant. No provision was made to use the waste from that plant. It all flowed into the sink.

Capt. Mellon, one of defendant's witnesses, testified that before June, 1905, the Colorado River was navigable below the intakes. (Trans. of Record, p. 810), but that it ceased to be navigable at that time.

Mr. Cory, one of defendant's witnesses, prepared a set of hydrographs which he used and which very largely formed the basis of his testimony with reference to the filling of Salton Sink. He said (Trans. of Record, p 1745):

" There is no reason from the hydrograph to believe " that the overflow waters of 1904 would have reached " Salton Sink. There is nothing to indicate that from " any information found in this (government) record."

The court will find some instructive information in the government gauge records of 1904 and 1905 with reference to the quantity of water which reached Salton Sink from the intakes of defendant. During that time there were three intakes in use by the defendant. The first measurement reported in these records is that of the 7th of October, 1904, on which day 1213 second feet were diverted through the Mexican intake. We do not know how much was being diverted during 1904 through intakes, Nos. 1 and 2. I refer now to page 28 of the 1904 record:

On the 15th of October, the diversion was 1976 second feet; on the 21st, 1356 second feet; on the 28th, 1016 second feet; November 4, 898 second feet; November 11, 937 second feet; November 18, 954 second feet; November 25, 886 second feet; December 2, 826 second feet; December 9, 879 second feet; December 20, 899 second feet and December 28, 607 second feet.

Beginning with the 8th of March, 1905, (Geological Survey Record for 1905, page 23) measurements of the inflow at the three headings were preserved by the Government. This record, considered in connection with the attempted excuses of Rockwood, presents some very interesting information.

There is nothing tending to show any effort on the part of defendant to close the first or second intake in the fall of 1904 or the spring of 1905. A brush dam was placed at the head of one or both of those intakes, not for the purpose of keeping water out of the canal, but in order to force more water into the third intake. Those brush dams were washed out in December, 1904. From December, 1904, there never was any effort to close the first or second intake.

The defendant attributes all of the damage suffered by the complainant to its, the defendant's, inability to close the third intake. That claim is flatly contradicted by these government records. On the 8th of March, 1905, there was being diverted into intake No. 1, 1110 second feet and into intake No. 2, 1530 second feet. On the 18th of March, 1905, defendant was diverting through intake No. 1 (we are referring now to page 23

of the 1905 record) 1270 second feet and through intake No. 2, 2200 second feet. On the same day there was diverted through intake No. 3, only 1530 second feet. On the 21st of March there was being diverted through intake No. 1, 2590 second feet, through intake No. 2, 2240 second feet and through intake No. 3, only 1920 second feet. On the 28th of March there was being diverted through intake No. 2, 1180 second feet and through intake No. 3, 1750 second feet.

There is no claim or pretense that any effort whatever was made in the spring of 1905 to close intake No. 1 or intake No. 2, and this government record shows that sufficient water was diverted through those intakes to cause very much, if not all, of the damage suffered by the complainant.

Mr. Rockwood claims that he made every effort to close intake No. 3. These government records show that up to and including the 6th of April, 1905, the greatest quantity of water which passed through intake No. 3 was 1920 second feet. If Mr. Rockwood had at his command men, material and money without limit—and he attempted to give the impression that he had—his failure to close No. 3 intake prior to the 6th of April, 1905 cannot be attributed to anything but incompetency.

These government records beginning with October, 1904, and extending through the year 1905, show that an enormous quantity of water was diverted through the intakes of the defendant and flowed into Salton Sink. And that the water which actually flowed through the intakes caused the destruction of complainant's property.

The government record for 1905 shows that the average quantity of water used for irrigation in Imperial Valley in January, 1905, was 328 second feet; in February, 1905, 269 second feet; in March 265 second feet; in April 682 second feet; in May 542 second feet; in June 596 second feet; in July 520 second feet; in August 532 second feet; in September 478 second feet; in October 351 second feet; in November 168 second feet.

In November, 1904, defendant, according to Rockwood, was diverting 900 and odd cubic feet although three of the four government measurements for that month show the quantity to have been more than twice nine hundred feet. Rockwood said (Trans. of Record, pp. 1213, 1411-1419) that the loss in carrying the water to the point where it was to be used was about 200 second feet, leaving, by his admission, 700 second feet to be disposed of during the month of November, 1904. If the consumption was as great in November, 1904, as it was in November, 1905, —and it is impossible from Rockwood's testimony to assume that it was greater in 1904,—there must, by his admission, have been at least 500 cubic feet per second wasting into Salton Sink in November, 1904. The government record for 1904 shows the wastage to have been 367 second feet for the week ending November 9; 386 second feet for the week ending November 15; 395 second feet for the week ending November 24; 304 second feet for the week ending November 30th. *It must not be forgotten that these records do not purport to show all the waste but only waste from certain canals.*

The government record shows that in September, 1904, the total irrigated area in Imperial Valley was 31,318 acres; whereas in March and April, 1905, the irrigated area was 79,591 acres. These seventy-nine thousand acres required only 265 second feet in March, 1905. How much was required to irrigate 31,000 acres in November and December, 1904? As everybody knows these are not irrigation months. Unfortunately we have no means of determining accurately just how much water was used for irrigation during those months. Defendant should know how much was used. It must have been paid for the water. The best evidence of which the case is susceptible indicates quite conclusively that the consumption for those months could not have exceeded 150 second feet.

The water having collected in Salton Sink, and having destroyed complainant's property, the next question which presents itself is, was that destruction caused by the act of defendant? That naturally suggests the question, did defendant conduct its operations along the Colorado River in a prudent and businesslike way, and in a manner calculated to afford to others whose interests might be affected, the protection to which they were lawfully entitled?

We desire to call the court's attention very hurriedly to the testimony in reference to the character of the country in which these intakes were cut. All the witnesses testified that Colorado River in this particular section was an alluvial stream, that its banks were shift-

ing, and changed very suddenly, and that the river frequently cut new channels.

Capt. Mellon, who has been familiar with the country as long as any living person, testified that for a period of years the river had shifted back and forth over a piece of territory seven or eight miles wide, and he described the various channels which the river followed during those years.

Rockwood said that before he began operations on the enterprise, he made it his business to interview people who had lived in the neighborhood for many years, and among others from whom he made inquiries was Capt. Mellon. It is hardly conceivable that these inquiries did not elicit to Mr. Rockwood information with reference to the character of the river, but we take it that any man, whether an engineer or not, could have told by a very casual inspection of the country that the stream was a treacherous one, and that any one who contemplated cutting an intake connecting the river with a canal should do so only with a great deal of care, not only for the protection of his intake and canal, but for the protection of others whose interests might be affected by a reckless method of carrying on his operations. Why were these intakes located as they were? Was there any reason for it? Were they located because those points were looked upon and regarded as the most advisable places in which to begin their construction? Not at all. We make the bald statement, which is supported by the record, that those points were selected as mere expedients, and that at the time of their selection, and

at the time when work was performed upon each one of them, it was recognized by everybody connected with the enterprise that not one of those three places was a safe or proper place to locate an intake.

Among the men who were identified with this enterprise in its early history was Mr. Fergusson, who testified that work was not begun at Hanlon's Heading because water could be secured quicker and cheaper where Chaffee began. (Intake No. 1.) Chaffee made the cut at that point for the purpose of serving the settlement as quickly as possible. When the work was begun by Chaffee, it was not intended to be permanent. It was called a temporary heading. That is the statement of one of the men who was identified with the enterprise in its incipiency. Another is the statement of Heber who said in his deposition, "These intakes were temporary " to enable the defendant to get water down quickly."

Sexsmith, the foreman of defendant, said: " The point " for the third intake was selected because we could " get water there and increase the water supply more " rapidly than at any other point, because it was the " shortest distance between the river and the canal. It " was simply a matter of moving materials that we were " figuring on. The shortest distance between the two " points." (Trans. of record, p. 959.)

Mr. Cory testified that the third intake was located on an old channel. Bear in mind in connection with that, the testimony of Fergusson that in a conversation with Chaffee, when they were discussing the point at which

the intake should be located, Chaffee said to him: "I "wouldn't dare go down to this point three or four "miles below the international boundary line because, "if we did, we might in sixty days turn enough water "into Salton Sink that would require sixty years to get rid of it." (Trans. of Record, pp. 425-426.)

Now, what happened? As an expedient, as a means of saving a little money, because, as Sexsmith said, it was a question of time and a question of moving material, defendant went to this third point, which Mr. Chaffee in his conversation with Fergusson described as dangerous, and connected the canal with the river at that point.

If the court will look at the maps and diagrams offered in evidence, it will find that the most casual examination should have been sufficient to induce the fear expressed by Chaffee to Fergusson, that untold danger would be created by the cutting of an intake at the point where the third intake was subsequently cut. The defendant built about four miles of canal, the building of nearly all of which could have been avoided, if the point at which intake No. 3 was subsequently cut, had been determined to be a safe place at which to locate an intake. Why did defendant build four miles of canal when by building about half a mile, it could have accomplished the same object, if its purpose was simply to divert water? Does not that of itself indicate that there was some substantial reason operating upon the mind of the man who laid out the system originally, for building that extra four miles of canal, and when that is coupled with

the statement of Chaffee that the place where intake No. 3 was subsequently located was an exceedingly dangerous point, it seems to lead irresistibly to the conclusion that when Rockwood cut the third intake, he threw chances to the wind and concluded to cut it regardless of consequences.

Fergusson says further (Trans. of Record, p. 419): "Rockwood always seemed to be firmly of the opinion "that the only way of controlling the water was to have "a thoroughly modern up-to-date intake constructed at "the Rocky Point." Rockwood advised the acquisition of Hanlon's Heading as a desirable point at which to construct the headgate and never indicated to Fergusson that there was any other safe point.

Duryea said (Trans. of Record, pp. 308-310):

"As a place to build an intake to get water into the "canal quickly, the place for the third intake was well "selected. As a place in which to build an intake which "could be easily protected against harmful enlarge- "ment, I don't think it was well selected for the reason "that the banks are low at that point and the materials "soft. Any one of those three intakes is quite liable to "great enlargement. All three are in very light alluvial "soil. None of them is safe against enlargement. All "of them were too dangerous for use."

"I formed the opinion that the only location at which "controlling works could be built with the certainty of "being effective was near the river, and that it was still "practicable to build such controlling works at a mod- "erate cost. I believe that at that time the flow could

" have been controlled without great difficulty. In my " opinion, no work of building the canal should have " been done before controlling works were put in, and " the works should have been located at the Rocky Point " just above what is now known as intake No. 1." (Trans. of Record, p. 307.)

" Rockwood told me it was the intention of his com- " pany to construct headgates as soon as the legal com- " plications in regard to taking water had been settled, " and when that point had been arrived at permanent " headgates would be built at the point which I have " described." (Trans. of Record, p. 324.)

" The only reason from an engineering standpoint for " not putting the first and only intake at the Rocky " Point would be the saving of expense and the saving " of time." (Trans. of Record, pp. 372-373.)

Rockwood did not deny the statement to which Duryea testified.

Duryea again said (Trans. of Record, p. 373):

" It was a saving of money whichever way you put it. " They could get the canal in use sooner by using a place " where they could dredge the intake easily and they " could also get it much cheaper."

On this subject, Rockwood said (Trans. of Record, pp. 1371-1372):

" Originally we didn't contemplate but one intake. " It was my intention to take the water from the river " at a point about a mile and a quarter above the con- " crete gate, at a point where the American Girl pump " is located. That place was selected because there was a

" cement gravel formation there, in which I expected to " make the opening, and the fact that the hills of that for- " mation came down and encroached upon the river at " that point, to my mind, prevented the possibility of the " river cutting in back. It was safer than where the cut " is now located."

" Originally I planned two gates, not two intakes, but " two gates, one at the river and the second gate at the " point where we have now built the concrete gate." (Trans. of Record, p. 1373.)

Mr. Meserve's statement to the Secretary of State seems to afford strong corroboration of the claim we are now making. He said (Trans. of Record, p. 2154):

" The California Development Company, by acquir- " ing the title to the land at Hanlons, *had acquired the* " *only site for controlling headgates* on the river below " what is now known as the Laguna Dam. The site also " controls what might be called or termed the gate-way " for the carrying of water into Mexico and through " Mexico again into the United States. *By the terms* " *of the concession from the Mexican Government to* " *the Mexican Company it was provided that no intake* " *connecting with the Colorado River should be con-* " *structed in Mexico until the plans of all proposed* " *structures were first approved by the proper engi-* " *neering authorities of Mexico.*"

Again Mr. Meserve said, speaking of a shortage of water in Imperial Valley (Trans., pp. 2154-2155):

" This condition continued until matters became so " serious, in June, 1904, *that Mr. Rockwood stated to*

" *Mr. Heber that he believed they would have to take* " *the chance and cut a third intake from the river to the* " *canal, about four miles below the boundary line, stat-* " *ing that as the fall of the canal was so much more* " *rapid than the fall of the river,* he believed there " would be no trouble in keeping the intake open. The " company had no money with which to build structures, " and even if it had, there would not have been time " either for the building of structures or the submit- " ting of plans for approval to the City of Mexico."

Again Mr. Meserve said (Trans., pp. 2155-2156):

" Mr. Rockwood and Mr. Heber made every effort " possible to get money sufficient to build the structures " *necessary to regulate this flow,* but before money could " be furnished the intake would be widened and the ex- " pense increased. Numerous efforts, however, were " made with the means at hand, all proving failures."

It is not very clear when intake No. 2 was cut. Rockwood says (Trans. of Record, p. 1193) that intake No. 2 was opened in June, 1904. Heber says it was cut in the spring of 1904. Mr. Meserve in his statement to the Secretary of State said it was made in the early part of 1904. Schuyler (Trans. of Record, p. 1313) said the upper intakes, (referring to intakes 1 and 2) had been left open during seasons of high water; that one of them had been left open during at least one season, and possibly two seasons, without any headworks to control the water. He also said he didn't consider that prudent. The intake which was left open during the season of high water must, of necessity, have been intake No. 2, and,

therefore, intake No. 2 must have been made before, and must have been open during, the summer floods of 1904.

Sexsmith said (Trans. of Record, p. 917 that intake No. 2 was used from the time it was cut for probably two years or two years and a half.

If intake No. 2 was used during the summer of 1904—and inasmuch as the Chaffee gate always remained at intake No. 1, it is not possible that Mr. Schuyler can refer to anything but intake No. 2 as having been open during the season of high water—the defendant is by this fact alone convicted of criminal negligence. What sort of prudence was manifested by the defendant and those in charge of its operation when they allowed the upper intakes to remain open during any flood season? That fact of itself conclusively shows that Rockwood's statement that he did not put a dam in intake No. 3 because he did not anticipate high water in February, 1905, is entirely lacking in candor. His conduct, in the light of Schuyler's testimony, that the upper intakes were open during seasons of high water, shows conclusively that he had no intention of putting a dam in intake No. 3, but that he proposed to take his chances with that intake just as he had with intake No. 2 during the summer floods. It is true he put brush dams at intakes Nos. 1 and 2, but they were not placed there for the purpose of preventing water from entering the canal, but rather for the purpose of forcing more water through intake No. 3.

He says (Trans. of Record, p. 1228) " I did not have " in mind the construction of dams to prevent floods " from coming in there."

It is fairly, and in fact irresistibly, deducible from the testimony of the defendant on this branch of the case that it left intake No. 2 open during the flood season of 1904. It fairly, and in fact irresistibly, follows from defendant's testimony that that intake was made prior to the summer floods of 1904, and there is absolutely nothing in the record to indicate that any obstruction was placed at its head, except a temporary obstruction placed there in December, 1904, for the purpose, as has heretofore been said, of forcing more water into intake No. 3.

In his statement made to the Secretary of State—made as the attorney for, and on behalf of, the California Development Company—Mr. Meserve said (Trans. of Record, p. 2155):

" In the latter part of June or the early part of July, " 1904, before making this connection, Mr. Rockwood " stated to Mr. Heber, the president of the company, " that if he was furnished with lumber with which to " build a controlling gate one month before the time " when floods were to be expected, he would not have to " close the intake *even in the winter season.* This Mr. " Heber promised he would furnish, expecting to be able " to do so, but the financial condition of the company " continued to be such that he was never able to fur- " nish the material for this temporary structure. This " lower intake silted up once and had to be dredged in

" order to keep the water flowing there through. The " floods in the fall of 1904 *came earlier than usual* with " the result that the opening at this third intake began " to wash and the inflow to increase and from that day " until the close of 1906 the condition continued to grow " worse. *By the middle of December, 1904, sufficient* " *water was going into the canal through this lower* " *intake to pass into the New River and on through the* " *New River into the Salton Sink, starting what has* " *since been known as the Salton Sea.*"

Of course it will not be claimed for a moment that there was any flood condition or any high water during December, 1904. The highest gauge reading during that month was 19.10. (1904 Record, p. 24.)

Mr. Meserve, referring to Chaffee's management of the defendant, said (Trans., pp. 2152-2153): "Instead " of doing this he built what might be called only a " temporary canal, and with a heading which never was " of any service, and so handled the securities which the " company acquired from the parties to whom it sold " water rights, and the moneys received, that in De- " cember, 1901, the stockholders of the company found " that he and his associates were taking from the com- " pany everything that it was taking in, and that they " were not expending one dollar of their own money in " developing the company's property. * * *

" The result of necessity was that the system con- " structed was not what it ought to have been or what " it would have been if the funds and property of the " company had been properly used instead of being

" diverted into the private hands of the former manage-
" ment."

It is an admitted fact that the highest water ever known in Colorado River was in February, 1891. That was not only the highest spring flood, but it was the highest flood known in the history of the river.

In attempting to excuse his recklessness in leaving open a cut connecting the river with the canal of the defendant, Rockwood said (Trans. of Record, p. 1201) that he had no records which would lead him to believe that the river would rise in January. This answer followed a statement made by the witness with a great deal of care, as to the investigation which he had undertaken and pursued to ascertain the conditions prevailing, and which had prevailed for many years, in order that he might fully acquaint himself as to what was necessary to be done to prudently divert water from the river. He did say that "the record shows some danger from " floods during February and March from the Gila." (Trans. of Record, p. 1234.)

" During the past thirty years, there is one year in " which a flood of any moment has come down from the " Gila." (Trans. of Record, p. 1234.)

" The only record I have of a heavy flood coming " down the Colorado and the Gila was the flood of " 1891." (Trans. of Record, p. 1235.)

" You can ordinarily assume that the rod records of " the Yuma gauge which would show a rise during the " month of February would come from the Gila." (Trans. of Record, p. 1235.)

"Q. And the only record you have of any Colorado "flood in February was in that same February of 1891, "when there was a concurrence of flood stages in both "rivers?

"A. Yes, of course, there would be some rise." (Trans. of Record, p. 1236.)

"Before I went on with this work I made a critical "examination of the gauge record from 1878.

"My recollection is there were two years when there "was a flood in February or March: 1884 and 1891.

"I did not discover until today that in 1895 the maxi-"mum height was reached on January 20th." (Trans. of Record, p. 1364-1365.)

This does not mean the maximum height for January, but it is the maximum height for the year.

Rockwood's statement with reference to the care displayed by him to get information regarding conditions which had existed during previous years was very elaborate. He began with the statement that there was but one year when there had been a spring flood. On cross examination, his attention undoubtedly having been directed meantime to the record, he found that there were two years during which there were spring floods, namely, 1884 and 1891; but he still did not discover that during the year 1895 the maximum height of the river for that year was reached on the 20th of January. This is a very significant fact because it was not until after February, 1905, that any effort or attempt was made to close the third intake.

Another very peculiar feature develops in the testimony of Rockwood. He realized that it would be rather awkward for him if a spring flood, very much less in volume than the spring flood of 1891, should widen his canal beyond repair. He knew, or probably knew, that he could not by a mere statement that he did not anticipate high water, escape the responsibility for the action of a flood for which there were three precedents. It is interesting to contemplate his effort to get out of this predicament. He says (Trans. of Record, p. 1241):

"The effect of the February flood on the third intake "was, it amounted to practically nothing as far as "either widening or deepening the intake was con- "cerned." And he says again, "the effect of the second "flood upon the canal was to enlarge it somewhat. To "what extent I am not able to state now, but nothing "that alarmed me at all. It was not widened material- "ly." (Trans. of Record, pp. 1246-1247.)

This brings us down to about the first of April, so that according to Rockwood from the time that high water came in February until the first of April, the canal had not been enlarged so as to alarm him.

Again he says (Trans. of Record, pp. 1246-1247):

"The canal was not broken by the February flood "from the outside at any place. I don't think the canal "broke at all from the March flood."

It follows from this that the water which went down the canal passed through the intakes, and was not overflow water. It was not water which found its way into the canal after overflowing the banks of the river.

Again Rockwood says (Trans. of Record, p. 1257:

" I do not remember that in the April flood the canal " broke at any place below the intake."

And now mark what he says (Trans. of Record, p. 1354):

" I didn't think it made any difference whether the " February flood came or not. If a flood came in Feb- " ruary I had every reason to believe it would be of " short duration."

He did then anticipate a February flood, and as Mr. Meserve says in effect in his Washington statement " took the chance on his ability to control it."

It was not, according to Rockwood, that he did not anticipate that a flood might come at that season of the year, but he did not think any damage would result from such a flood. Probably because he had left intake No. 2 open during the high floods of 1904, and fortunately no damage was done to the salt company, he concluded to take the same chance on the third intake for the February flood, the possibility of which he clearly recognized. Indeed he says (Trans. of Record, p. 1355): " I would " not have feared such a flood as that of February, " 1891."

Confessedly the flood of 1905 was not comparable to the flood of 1891. What value is to be attached to the statement of an engineer who will say that, anticipating the possibility of a flood like that of 1891, the highest flood that ever occurred in the Colorado River, he would

not have considered it imprudent to open the third intake and leave it without protection.

We do not need the advice of an engineer as to whether it was prudent or imprudent to connect a canal with a river like the Colorado at a point where this third intake was located. Common sense tells us that it was highly imprudent, and any engineer who will say that it was not imprudent robs himself of the right to any respect.

Sexsmith says (Trans. of Record, p. 1045):

"The canal from the third intake was originally "dredged to a width of 50 feet." He made an effort to close the intake after high water came, and after that effort had failed and when he began the second effort, the canal had widened to 125 feet. (Trans. of Record, p. 927.)

It is impossible to reconcile the statements of Sexsmith and Rockwood on this subject, and it would not serve any useful purpose to further point out the discrepancies between them.

The Geological Survey Record shows that the canal must have been enlarged with the first high water. No other explanation can be afforded for the quantity of water diverted after the middle of February. But long before high water came the property of complainant was materially damaged and some of it entirely destroyed.

According to Rockwood (Trans. of Record, p. 1244) the first dam placed or attempted to be placed at intake No. 3 was washed away by a March flood. According to

the gauge record the highest water between the 1st and the 15th of March was 26.70 feet, the river remaining at that height for only one day, namely, the 3rd of March. The next high water in March was on the 16th, when the gauge read 26.10. On the 17th it was 27.35; on the 19th it was 28; and on the 20th it was 30.25.

On the 18th of January of that year the water reached the maximum height for the month at 23.95. It remained below that figure until the 8th of February, when it reached 28, and on the 9th of February it reached 28.75. An examination of the gauge readings from the time when Rockwood says the first flood occurred down to the 3rd of April will show that no substantial reason existed for the failure to build a dam or gate at intake No. 3 except the indifference of the defendant or its inability to obtain the necessary means to prosecute the work. There is no doubt that about the 1st of June, 1905, Mr. Perry began the construction of a dam and prosecuted the work for some time. This work was actually going on the 5th day of June, 1905, when Mr. Sherman, Mr. Duryea and Mr. Wynn of the Engineering Department of the Southern Pacific Company were at the intake. On that day the gauge registered 28.3. There was no overflow of the banks at that time. If work could have been prosecuted with the gauge registering 28.3, no plausible excuse for the failure to close the break before the 3rd of April is to be found in the record. If Perry and his men could work without difficulty with the gauge reading 28.3, how many days were there between the first of February and the third of April, 1905, when work could not have been prosecuted?

If the point is deemed to be of sufficient importance an examination of the record will show that no engineer was actually in charge of the work upon the ground until the cut had widened to such dimensions as to make it practically impossible to control the flow, even with unlimited money, men and material.

Unless we conclude that the defendant was desirous of working injury to somebody, there must be some reason for its apathy between February 1st and April 3rd. That reason is supplied by the testimony of Schuyler, one of its own witnesses, who says (Trans. of Record, p. 1316) that the reason why some of the work was not prosecuted in good season was that the defendant did not have the material with which to do it. The material was not on hand with which to prosecute the work.

The third intake was cut in utter disregard of the provisions of the concession.

The failure of the defendant to erect headworks to control the flow of water in the canal was nothing short of criminal negligence. We have referred to the testimony of Duryea to the effect that it was not safe to construct any one of the three intakes leading into the canal without controlling works.

Hawgood, a witness for defendant, said (Trans. of Record, pp. 1146-1148):

"If cuts were made in the bank of the river without "protection, the tendency would be for them to cut "wider with rising water, and if the water is high "enough and there is a considerable current in the cut

" it will have a washing effect, and if the cuts are ex-
" pected to be permanent, they should be protected
" against that effect in some way. To prevent a larger
" flow into the intake it is necessary there should be
" some way of controlling the flow. I consider the con-
" struction of intakes on the banks of the Colorado
" River without provision for controlling the flow of the
" water very much of an experiment."

Why should Mr. Hawgood consider it an experiment? He didn't know anything more about the conditions than Rockwood claimed to know when he made the cuts.

Hawgood then says (Trans. of Record, p. 1148):

" But if I had succeeded in doing it before I would
" have attempted to do it again. If I had been success-
" ful I would be tempted to take chances on it."

Will any one claim that yielding to *temptation* to take *chances* in a work of this nature is good engineering? When an engineer takes chances in a business of this nature he throws discretion and judgment to the winds.

It is true Rockwood said he took the chance because he had done it successfully once. But that is no sufficient reason why he should have shown such hardihood a second time. He took a chance according to Hawgood when he made the first cut. It was just as bad judgment, just as criminally negligent, for him to take the first chance as it was to take the second or the third.

The third intake was cut in October, 1904. It was claimed by Rockwood that plans for a gate at the head

of this intake were made in November, 1904; in other words, one month after the cut was actually made.

According to Mr. Meserve's statement, defendant had no authority to cut the intake until plans for a gate had been prepared and approved by the Republic of Mexico.

Rockwood said (Trans. of Record, p. 1352):

"It appeared to me entirely reasonable to cut the "banks of the river so as to connect it with the canal, "and some time after I had cut the banks I prepared "plans for a gate, which plans I knew would have to "be sent to the City of Mexico for approval. After I "had cut the banks I prepared plans for a gate."

"After the February flood the river fell, so that the "work of constructing a gate could have been carried "on. It was not carried on, because we did not have the "approval of Mexico. We did not have the approval "of Mexico when we cut the river bank and turned the "water into the canal.

"Q. Was it more important in your opinion that "you should have the permission of Mexico to construct "that headgate than you should have its permission to "cut the banks and let the waters flow out of the river?

"A. It would take very much longer to construct "the headgate than to cut the channel through to the "river, and apparently there was no particular danger, "and seemingly there was no danger in cutting the "channel through into the river. I did not think it "made any difference whether the February flood came "or not. If a flood came in February I had every "reason to believe that it would be of but short dura-

" tion, also that if it did, I would have ample time to " close the channel between the time of such flood and " the rise of the summer flood." (Trans. of Record, pp. 1353-1355.)

This statement is entirely inconsistent with the claim that Rockwood did not anticipate a February flood. It is impossible to reconcile this with the statement elsewhere made by him that he had no reason to anticipate high water at that season of the year. He did anticipate high water and speculated upon the effect it would have upon the canal. Admitting, inferentially at least, that he anticipated high water at that season of the year, he said (Trans. of Record, p. 1352):

" What I might not have anticipated was a succession " of floods such as had never happened before in the " history of the river."

It is to be borne in mind that it was the February flood, the flood which Rockwood anticipated, which did the damage. An inspection of the records of the Geological Survey shows beyond controversy that the volume of water which was flowing to Salton Sink through the intakes in February was sufficient to account for much of the damage suffered by the complainant.

Again Rockwood says (Trans. of Record, pp. 1352-1355):

" All the floods had a tendency to enlarge the channel. " My recollection is that the February flood did not wid- " en the channel. I would not have feared such a flood " as that of February, 1891."

As has heretofore been said, the largest flood that ever occurred in the history of the Colorado was that of February, 1891. That is the flood which, according to the defendant's experts, caused the formation of a lake in Salton Sink in 1891. How Rockwood can reconcile the history of the flood of 1891 with the claim that it was not imprudent to cut the third intake and leave it open during February, 1905, is hard to understand. He said (Trans. of Record, pp. 1356-1357):

"If an engineer had known of the flood of February, "1891, and the extent of that flood, and had reason to "believe that it might repeat itself, it would not have "been imprudent for him to cut the river and to allow "water to flow into the canal, which was not to be pro-"tected by a headgate, and have left it in that condi-"tion from October, 1904, until February, 1905."

We have heretofore called attention to the fact that, on direct examination, Rockwood said there was but one year prior to 1905 when there was high water in the spring of the year. The government records show that there were three years prior to 1905 when high water occurred in January, February and March. When these records were called to his attention, and he was asked whether, in view of the facts disclosed, he considered it prudent to cut the third intake and leave it open, he replied (Trans. of Record, p. 1367):

"I consider that prudent engineering for the reason "that I am positive that one flood would not have in-"jured the canal or have opened it up."

Rockwood says (Trans. of Record, pp. 1369-1370) when questioned with reference to the prudence or lack of prudence in connecting the canal with the river without any headgate to control the flow: "It was always " the intention to construct headgates. Plans were got- " ten up for it. It was considered a portion of the canal " system. There may have been discussions with Fer- " gusson, Beatty, Chaffee and Heber with reference " to the necessity of headgates to control the flow of " water into the canal. I knew that headgates would " have to be put in, and so advised my associates. Those " headgates were to be put in to prevent the flow into " the canal of more water than was needed for irriga- " tion. Mr. Chaffee built the first at intake No. 1, which " was the only gate ever built until 1906. There was " no gate built at intake No. 2, nor at intake No. 3."

He said (Trans. of Record, p. 1347) that the break could have been closed in 1905 by the means that were successfully adopted in 1906 and 1907. And further: (Trans. of Record, p. 1389): "During the latter part " of 1904 we had money enough to make provision to " prevent the water from flowing into the canal, but we " did not have time. It was necessary, in order to get " water for the use of the people at Imperial, to get the " intake through there at once. A gate could not have " been constructed inside of three or four months."

It was not that Rockwood did not recognize the necessity for the gate, but all of these quotations go to emphasize the fact that he was willing, in the language of Mr. Hawgood, "to take chances on it".

Again he says (Trans. of Record, pp. 1389-1391):

"When I cut the banks in October, I knew a gate "could not be constructed inside of three or four months. "I recognized there was a possibility of high water "in January, February and March. I would not call it "a probability, unless the chances were in favor of a "flood. I thought it perfectly proper to make the cut "under the circumstances, because I did not believe that "the flood coming in February or March or January "would so open the channel as to do any particular "harm to any of the interests. I thought it prudent to "make this cut because I had closed practically the "same kind of a channel three times before."

(Trans. of Record, pp. 1403-1404): "The third in- "take was cut because it was the belief that it was nec- "essary to do so in order to furnish the people of Im- "perial Valley with a sufficient amount of water for "their use during the seasons of 1904-1905. Notwith- "standing my very careful investigation, and the efforts "which I made to ascertain the conditions existing, I "did not until today discover the fact that there had "been high water in January in any year."

(Trans. of Record, pp. 1576-1577): "At all times dur- "ing Mr. Fergusson's connection with the defendant, I "was supposed to be in control, at least of its engineer- "ing force; part of the time I was vice president."

We now call attention to the testimony of Mr. Follett, a witness for the defendant, given in answer to a very long question propounded by counsel for defendant. He

was asked in substance whether taking everything into consideration an engineer was justified in making this cut, to which he answered (Trans. of Record, p. 1516):

"My answer is that I believe he would have been justified. I think I would have done it myself if I had been in his place, and my reasons for it are these: In an irrigation enterprise a man has to take chances generally which he would not take in other engineering work, for the reason that funds are generally scarce; that the money put into the enterprise has got to lie there a number of years, at least, waiting for settlers coming in under the enterprise, before he can get any return. So the engineer must spend money carefully. *In this particular case it would, of course, have been the best and wisest policy to have built a steel concrete headgate at Hanlons before the canal was opened,* to have built that canal full size all the way down, to have arranged sand gates for taking the water out at quails cuts, and done a lot of other things that would have cost a whole big sum of money, and then sat down and waited until settlers came into the valley before you got any return on your investment; or, if you had borrowed the money, in the meantime you would be paying interest on it. But there is not one case in a hundred where that can be done. In this case it could not be done. A temporary gate was built, and built too high. They had to make an open cut around it. That open cut was in a sharp bend, and the water ran through it in a whirlpool."

Is it for Mr. Follett to tell us, or are we to believe, that that sort of thing is prudent? Counsel on the other side will probably say that the fact that the water went through that cut like a whirlpool without doing any serious damage is evidence of the fact that the act was prudent, notwithstanding the fact that Follett a little later on says that the cut was made upon a quicksand foundation. (Trans. of Record, p. 1518.)

The defendant is convicted by Follett of the grossest sort of imprudence for, instead of pursuing what he says was the wisest policy, namely, that of putting in a gate before the canal was connected with the river, defendant cut a by-pass in a bend in a quicksand foundation and let the water go round it like a whirlpool, and continued that policy for three years.

Another witness who testified on this subject for defendant was Mr. Schuyler. He said (Trans. of Record, pp. 1310-1313): "The break at the third intake could "have been prevented by building controlling works.

"Q. Is that the reason the break occurred, the fact "that there were no controlling works?

"A. *That* and the volume of water that was in the "river.

"Q. No matter how great the volume of the water, "could not the break have been prevented if proper con- "trolling works had been constructed before the high "water came?

"A. Certainly.

"Q. Would that have been prudent engineering, in "your opinion?

"A. Yes.

"Q. Was it not very imprudent engineering not to "have done that, in your opinion?

"A. It is work that should have been done with the "possibility——

"Q. Now, Mr. Schuyler, answer the question, and "then you can make your explanation. Was it not very "imprudent engineering not to do that work before the "high water came?

"A. I don't know that I care to criticise it so "severely as that. It was always recognized by Mr. "Rockwood and me as necessary to construct a gate. "The upper intakes had been opened during seasons of "high water."

Schuyler was consulting engineer for this enterprise from the early part of 1904, and said that the upper intakes had been open during seasons of high water; that one of them had been left open during at least one season, and possibly two seasons of high water without any headworks having been constructed. (Trans. of Record, p. 1313.)

He says further (Trans. of Record, p. 1313): "*I* "*didn't consider that prudent, no.* I always preferred "that controlling gates should be put in all intakes of "that sort, although the necessity for them was not so "emphatically evident because of the repeated and per-"sistent filling of the channel or the canal by silt."

On this same subject Schuyler said (Trans. of Record, pp. 1314-1320): "The fact that one channel leading out

" of the river silted was no reason to make any assump-
" tion that another channel would not be enlarged, but
" there was no intention of leaving this lower intake
" without a gate, without control. Headgates could have
" been constructed within thirty days after the material
" was on the ground, and it would take ordinarily four
" to six weeks to get the material on the ground. I would
" say that within ten weeks at the outside from the
" time the material was ordered, a gate could have been
" constructed which would have controlled the flow of
" the water into the canal.

" Q. As consulting engineer for the company, there
" is no reason that now suggests itself to your mind why
" that gate was not constructed within ten weeks from
" the time when the river bank was cut, so as to allow
" water to flow into the canal?

" A. The only reason I know is the fact that the
" Mexican Government had not approved the plans for
" the gate. I think the Mexican Government approved
" the plans for the gate in December, 1905, about thir-
" teen months after the channel had been cut.

" The material composing the banks of the Colorado
" River is rather unstable, the river changes its channel
" very frequently, very suddenly.

" Q. Do you say it is prudent to connect a canal or
" channel with a stream that has that inclination before
" you make any provision to control the flow into the
" channel?

" A. In this particular locality there had been no in-
" dication of a change in the channel for a long time.
" Its banks were quite permanent."

Here it may be well to suggest that Mr. Cory, another witness for the defendant, said that the point where this third intake was cut was the place from which in 1891 the water got from the Colorado into the Alamo.

Again Schuyler says (Trans. of Record, pp. 1321-1328): "The gauge records of 1891 show very high " water in February. It was prudent in constructing a " canal leading out of a stream of that kind to assume " that an extraordinary condition might occur again. It " would not have been considered prudent to assume " that extraordinary conditions might not occur again.

" Q. From an engineering standpoint, is it not a " fact that the only reason why that break occurred was " that there were no headgates constructed in that " canal?

" A. *That was certainly the starter of the break.* I " am not prepared to say that by extraordinary floods " like 1905, a new channel might not have broken out " that might have made a new channel.

" Q. Is it not a fact that the only reason that that " break occurred in that channel was that no headgates " were constructed in the channel?

" A. *I know it is fair to assume that if there had " been headgates in that channel, the channel would not " have enlarged to carry the entire river as it did.*

" Assuming that there had been headgates, there is " no certainty as to the effect which the overflow of the " river would have had upon the canal."

As bearing upon this last answer of Schuyler's, it is well to have in mind a portion of Rockwood's testimony

previously quoted. He spoke of the February, March and April floods and said they did not break the banks of the canal. The fact is that when the banks of the canal broke in February, March or April, they broke from the inside, that is to say, because of the pressure of water from the inside, and not because of any overflow water causing pressure from the outside.

Going back now to Schuyler, he said (Trans. of Record, pp. 1328-1332):

" *It is certain that the break was enlarged, the chan-*
" *nel was enlarged because of the absence of headgates.*

" Q. It is certain that nearly the entire flow of the " water in the Colorado River was diverted into that " canal because no headgates were put in there when the " river banks were cut, is it not?

" A. *Well, that is another way of putting the same* " *question.*

" Q. Do you wish to be understood as saying that, " in your opinion as an engineer, no works could have " been constructed there that would control the flow of " water into the canal?

" A. *No, I do not. A gate connected with a strong* " *levee system that would have prevented any over-* " *flow at all on the west side of the river would have* " *prevented any water getting through this channel, but* " *without a levee system the gate would not have pre-* " *vented and controlled the flow*

" Q. The construction of a gate would not have ag- " gravated the condition? In other words, it would not " have made it worse than if the river had been left in " its original condition?

" A. Oh, no. *So far as I know there were no phys-*
" *ical obstacles preventing the construction of a gate*
" *which would have entirely controlled the flow of water*
" *into the channel, prior to the 15th of January, 1905.*
" *That was the plan which I advised Mr. Rockwood to*
" *follow.*

" Q. *And unless you had understood that a headgate*
" *was to have been constructed immediately so as to*
" *control the flow of the water into the channel, you*
" *never would have consented that the river banks*
" *should be cut, would you?*

" A. *Probably not. We never anticipated any diffi-*
" *culty in getting the gate in and controlling the river.*
" *I advised Mr. Rockwood that a gate was necessary*
" *several times.*"

And yet according to Mr. Rockwood, the thought of the necessity of a gate never entered his head.

" Q. You say the plans for closing the break were
" feasible. Why did they fail?" (Trans. of Record, p. 1332.)

Bear this in mind, because it has something of a bearing on the testimony of Mr. Rockwood and Mr. Sexsmith as to the sufficiency of the material at all times to prosecute all needed work down there.

" Why did it fail?

" A. *Because of the long delay in getting to work, in*
" *getting supplies.* In the meantime the channel had en-
" larged. The principal occasion for the long delay was
" the substitution of Mr. Edinger's plan for that of Mr.
" Rockwood, for which the manager or president of the

" company was responsible." (Trans. of Record, p. 1332.)

In view of this showing by defendant's witnesses, it is asking a good deal of the Court to say that defendant's operations were carried on prudently from an engineering standpoint.

The defendant admits that a very large quantity of water which passed through its intakes reached the property of complainant and caused very serious damage; but it claims that if the water had not flowed through the intakes and reached complainant's land, it would have overflowed the banks of the river and finally reached the land and would have worked the same damage as was caused by the water which flowed through the intakes. That, of course, is pure speculation, and was so held to be by the Court below.

Cory, one of the defendant's witnesses, said (Trans. of Record, pp. 1672-1674):

" Practically most of our testimony is speculation in " this case. It is a matter of assuming certain conditions " in accordance with the best knowledge we have on the " subject, and then figuring what would happen. I am " not sure of anything down there, because I don't know " anything about them except by hearsay. I know the " situation and I know the channel as it existed then " connected with the river, and in seasons of high water " an enormous volume of water would go down the " canal."

(Trans. of Record, pp. 1692-1693): "It is a fact that " at seasons of high water, and medium and low water

" for the last two years, water has flowed into the Salton " Sink from the Colorado River. A great deal of it got " there from the Paradones River, via Volcano Lake, " but not in seasons of low water."

Again he says (Trans. of Record, p. 1693): "In low " water it got down there through the Alamo channel " and reached the Alamo channel through the Mexican " intake No. 2 and the Mexican intake No. 3. That " flow into Salton Sink was very considerable.

" Q. Would any of it have gotten in there if it hadn't " been for intake Number 2 and intake Number 3?

" A. That is the very point."

The witness then goes into a long explanation about the deposit of silt, and states that what happened was that the Alamo channel became enlarged right where the cut was and the river went down that channel. And yet Mr. Follett says it was perfectly prudent to make the cut at that particular place.

Again Cory says (Trans. of Record, pp. 1696-1697): " I don't believe that a little cut 50 feet wide that silted " up twice, like everything else in those canals, is re- " sponsible for that great big change. I think one flood, " or two floods, or three floods, would not have done it, " but I think the succession of floods that came down " here since 1904 and 1905 and 1906 enlarged the chan- " nel.

" Q. Of course we know that as a fact. About that " there can be no speculation?

" A. Exactly."

Again (Trans. of Record, p. 1697):

"Q. Can one say it would have happened if the little "cut had not been made?

"A. No; but, on the other hand, I don't think one "can say the reverse."

And again (Trans. of Record, p. 1697-1698):

"It is more than probable that the little cut contribu- "ted to the enlarged channel. To what extent I am not "prepared to say.

"Q. Why are you unable to say that the little cut "was not entirely responsible?

"A. Because there is considerable probability that it "would have happened without it.

"Q. That is speculation again, isn't it?

"A. That is what we are dealing in most of the "time."

Again (Trans. of Record, p. 1753): "It is improbable "but not impossible that the same conditions which ex- "isted in 1891 might have existed in a subsequent year "or in a former year and not have produced the same "result with reference to the flooding of Salton Sink."

And then he goes on (Trans. of Record, p. 1754): "From conditions existing in one year you can't prog- "nosticate with absolute certainty as to what might ex- "ist in another year so far as the flooding of Salton "Sink is concerned."

It is fair to say of this testimony that it is of such a speculative character as that it is impossible for the Court to adopt it as a rule or guide.

It was claimed by the defendant in the Court below that if it had not dug the canal nor opened an intake connecting the canal with the river, nevertheless on account of the high water which prevailed in 1905 and 1906, the overflow from the river would inevitably have reached Salton Sink and destroyed complainant's property. In support of that claim much testimony was offered for the purpose of showing the probable overflow of the river during those two years. No one pretends to know what the overflow was in fact, nor the gauge height at which the river overflowed its banks.

While having in mind the highly speculative nature of defendant's testimony as to the destruction that would probably have been suffered by complainant from the high water of 1905 and 1906, it must not be overlooked that, before the very high water came in 1905, the property of complainant had been practically destroyed. The testimony of Mr. Drury, a witness for complainant,—which stands in the record, we think, without any contradiction—shows the following facts (Trans. of Record, pp. 1968-1970): On the 31st day of October, 1904, water appeared in Salton Sink about four or five miles from Salton. On November 1st the water was about one mile from the end of the Salt Company's railroad track. On November 7th the water was coming with a rush on section 34. On November 14th it reached and covered all of the salt deposit to a depth of three inches. On the 15th the witness planned a levee to protect the salt mills and the piles of salt. On the 21st the water was four inches from the rails of the Salt Company's track on the marsh. On the 9th of January, 1905, it reached a

point about 600 or 700 feet from the mill. On the 11th it was at the main levee around the mill, works and buildings. On February 7th the levee, which had been thrown up to protect the works against the water, was badly damaged. On March 5th the levee broke and much salt was destroyed. On March 7th the water was two feet deep on the tracks at the mill. On March 26th the mill buildings were destroyed and the warehouse was completely destroyed. On May 3rd all of the buildings below the main mill were destroyed. On August 25th the water was on the floor of the store. On September 3rd it was in the library. On September 6th all buildings, except the dwelling houses and offices, were destroyed. On October 13th the temporary mill—which had been erected on account of the flood conditions—was washed away. On October 25th all of the buildings were about gone; and on October 27th all of the buildings had completely disappeared.

It appears from this testimony, which, as we have said, is not contradicted, that by the 26th of March, 1905—up to which date there had been no exceedingly high water in the Colorado; at any rate, if high water had prevailed it did not last for a protracted period—the property of complainant was practically destroyed. The record will be searched in vain for any explanation of the cause of this great damage and injury to complainant other than the reckless method pursued by defendant in the conduct of its operations.

For the purpose of making a comparison between the quantity of overflow in 1891 and in 1905, some of defend-

ant's witnesses assumed that in 1891 the river overflowed when the gauge reached 22. As to the fact, we know nothing. No one testified that in 1891 the river overflowed when the gauge reached 22. No one knows what the condition of the bed of the river was in 1891. No one knows what conditions prevailed at the time the overflow began in 1891, except that the river did overflow its banks in February of that year, and that there was also an overflow of the banks during the summer of that year.

Much stress was laid by the other side upon a statement which appears to have been made by Mr. Sherman that he was at the intake at one time when the water was overflowing the banks when the gauge registered 22.5. Sherman afterwards said that he had attempted to find that date, but could not find any date when he was there that the gauge registered 22.5. He was there on the 5th of June, 1905, when Mr. Perry was prosecuting the work of attempting to close the break and when the gauge registered 28.3, and when admittedly—we say "admittedly" because it has not been denied—there was very little water overflowing the banks in the vicinity of the intakes.

Walter D. Smith, one of the defendant's witnesses, said (Trans. of Record, p. 868): "When the gauge " reaches 24 or 25 the river overflows in the vicinity of " the Headings."

Whether he meant a general overflow or not, we do not know.

Heber said: "My opinion was the river did not over-
" flow until it got about 27 feet—26 or 27 feet gauge
" height at Yuma. I know that when the river is at
" about 25 to 26 feet, our canals have kept out the flood
" right along."

Cory said (Trans. of Record, pp. 1656-1663): "It is
" a fact that at the present time it requires a gauge
" reading very much above 23 at Yuma to cause a gen-
" eral overflow of the river in the vicinity of the break.

" Q. Will you not say it requires a gauge reading of
" at least 26 at Yuma in order to bring about a general
" overflow all along the banks, making it impossible for
" a man to walk along the banks?

" A. I really don't know, but I should say it would
" be pretty much there. I should say, to take a guess
" at it, 26 would be about right; but that contemplates
" an overflow which overflows the entire length of the
" bank, and then the water along portions of the bank
" would be very shallow in some places. There would
" be some little islands. With knee boots a man would
" have no difficulty in making his way along. When the
" Yuma gauge read 26.4, I would say that for four miles
" above and four miles below the dam, one-third of the
" banks was entirely submerged. If you describe a gen-
" eral overflow as one which covers the banks entirely,
" it is necessary that the gauge at Yuma should register
" more than 26.4."

Again (Trans. of Record, pp. 1735-1736):

" Q. And at best one gets into the realm of specula-
" tion when he attempts to say that any given reading

" of the gauge would indicate a general overflow of the " river, does he not?

" A. It is not certain at all, but I hardly think it is " fair to consider it speculative, because if we were to " do that, practically all of our hydraulic determinations " as to quantities of water would be classed as specula- " tive, until recent years, throughout the west."

Again (Trans. of Record, p. 1794): "After the break " was first closed in November, 1906, the bed of the river " below the break scoured about three and a half feet."

No one can tell just what effect the piling of three and one-half feet of silt in the bed of the river just below the intake had upon the overflow of the river above that point. That it had a very decided effect, no one will deny. That was a condition brought about by the defendant. Complainant was not responsible for it. Nature was not responsible for it. It cannot be attributed to any natural condition. Defendant was, therefore, directly responsible for so much of the overflow as was caused by the piling up of that silt.

Cory said (Trans. of Record, p. 1795): "The silt in " the river did not account for the overflow entirely at " that point in 1906. It simply meant a greater height " of overflow than otherwise would have occurred."

Yet all of defendant's engineers used the overflow of 1905 and 1906—or rather the supposed overflow—brought about very largely by the piling up of that silt in the river due to the operations of defendant, for the purpose of showing that a very large quantity of over-

flow water probably found its way into Salton Sink in 1905 and 1906.

Mr. Duryea said (Trans. of Record, pp. 1827-1830): "I visited the river in June, 1905. At the third intake "on June 5, 1905, Mr. Sherman and Mr. Wynn were "with me. The bank was caving then on the down-"stream side of the intake. The bank was visible above "the water. It is my conviction the bank must have "been two feet above water at that time. I am positive "it was more than one foot. The gauge height which I "have from my own notes, as well as the government "records, was 28.3. At that time the height of water "on the Yuma gauge which would have been necessary "to overflow the land just to the south and just to the "north of the third intake would have been about 130 "feet (a gauge reading of 30). This is not a matter of "doubt with me, not a matter of opinion and belief in "the ordinary sense; it is a matter of certainty with me.

"Q. How did you get about there?

"A. We walked about.

"Q. Where did you walk?

"A. We walked about in the neighborhood of the "north bank, or the upstream bank, of the intake, in the "immediate neighborhood of where Mr. Perry was do-"ing the work. There was a large number of Indians "working there at the time. Some were cutting brush "and some were placing brush on the barrier. The "bank was not wet at the intake. My recollection is "that back in the woods there were many wet spots, "but no general overflow."

All of the witnesses for defendant who testified to the quantity of overflow water which would probably have reached Salton Sink in 1905 and 1906, even though the canal and intakes of defendant had not existed, assumed that there would have been a general overflow of the river when the gauge stood at 23. In this connection it is well to remember that Rockwood testified that the third intake was opened between the first and fifteenth of October, 1904, and when asked for some explanation for cutting the intake without first installing a gate, he said there was no reason to anticipate high water at that time. On the 17th day of October the gauge read 22.35. The record finds Mr. Rockwood in a very awkward dilemma. If a gauge reading of 23 meant a general overflow of the banks of the river, then the overflow point had about been reached within a few days after they began to use the third intake. On the other hand, if 23 was not the gauge reading at which there was a general overflow of the banks, the figures presented by defendant's experts to show the quantity of overflow water which would have reached Salton Sink in 1905 and 1906 are altogether incomplete and unreliable. In other words, the keystone of their structure is gone.

As heretofore said, all this testimony,—and that was the conclusion of his Honor Judge Wellborn—is of the most highly speculative nature and cannot be relied upon to establish the conditions which defendant claims to have existed.

Cory admitted, rather reluctantly, that it was not at all certain that a given reading of the gauge would in-

dicate a general overflow of the river. There is nothing in the record that establishes the unreliability of the gauge record as a guide to determine the height at which the river will overflow at the intake better than the record itself. Referring to the 1905 gauge record, it will be found that with the gauge reading 18.60 on one day, the flow of the river was 3895 second feet. When at a later date the gauge read 18.50 the flow was 6440 second feet, or nearly double that of the previous reading. With a gauge reading of 21.3 at one time, the flow was 23,220 second feet, and with the same gauge reading at another time, the flow was 28,650 second feet. With a gauge reading of 19.6 at one time, the flow was 6000 second feet, and with the same gauge reading at another time the flow was 13,800 second feet. With the gauge reading 22.3 at one time the flow was 20,000 second feet, and with the same gauge reading at another time the flow was 30,000 second feet. With the gauge at 23.95 at one time the flow was 27,000 second feet, and with the same reading at another time the flow was 41,000 second feet. With the gauge at 25 at one time, the flow was 27,000 second feet, and with the gauge at 25.10 at another time it was 47,000 second feet. With the gauge at 26.20 the flow was 39,000 second feet and with the gauge at 26.10, or one-tenth lower, the flow was 60,000 second feet. With the gauge at 28 at one time the flow was 67,000 second feet and with the gauge reading 28 at another time the flow was 73,000 second feet. With a gauge reading of 28.78 the flow was 77,000 second feet and with a gauge reading of 28.90 the flow was 91,000 second feet. With a reading of 30.25 the flow was

110,000 second feet, and with a reading of 31.3, the flow was only 102,000 second feet. And yet the Court was asked to accept the gauge records for the purpose of determining at what height of the river there was a general overflow of the banks at a point 12 miles below Yuma; Yuma being the point at which the gauge was located.

For the purpose of showing how very speculative the testimony of defendant on this branch of the case is it is instructive to put an extract from the testimony of Hawgood alongside of an extract from the testimony of Cory. Hawgood was asked (Trans. of Record, pp. 1129-1130) why it was that the flood of 1905—and the flood of 1891 is the only flood which reached Salton Sink prior to the flooding of the sink in 1905, so far as we are advised—why it was the flood of 1905 reached Salton Sink, and he replied that it was because the flood of 1891 had left open the channel leading from Colorado River to Salton Sink. He said (Trans. of Record, p. 1129): "In my opinion the flood of 1905 found the channel lead-"ing from Colorado River to Salton Basin open," and he explains that it was opened by the flood of 1891.

Cory said (Trans. of Record, p. 1726): "The flood of "1891 probably left a good deal of drift in the channels, "and at the same time, on the other hand, probably "washed them out, but as the water went down it would "doubtless leave a good deal of drift, so that the chan-"nels may or may not have been choked."

And at Trans. of Record, p. 1751: "It would be a "matter of speculation whether the channels leading

" towards Salton Sink were any more open after the " flood of 1891 than they were before."

In the foregoing discussion of the facts, we have relied almost entirely upon statements of defendant's witnesses. Complainant's witnesses, particularly Duryea, Sherman and Drury, after making exhaustive investigations to determine the source of the water which was being discharged into Salton Sink and which worked the destruction of complainant's property, testified, positively and unequivocally, that it came from Colorado River through the intakes of defendant and through the canal leading from those intakes to Imperial Valley. We deem it unnecessary to quote the testimony in detail. The subject is fully covered in the direct examinations of those three witnesses.

The Court is asked, in effect, to arbitrarily determine that the river would have overflowed in 1905 at a certain gauge height, and that the water which did, in fact, reach the sink through the intakes of defendant would inevitably have reached there, although there had been no intakes.

That is very dangerous sort of speculation to employ in determining the rights of parties such as are in controversy here. We all have the right to speculate and theorize. We have as much warrant for doing that as any of the defendant's engineers. It may sound egotistical, but we think we know as much about the subject as they do. In other words, they do not know anything more about it than we do. The following theory is more plausible than and quite as sound as that exploited

by the defendant's witnesses, namely: That the subsidence of the flood of 1891 automatically—so to speak—closed the channels leading from Colorado River to Salton Sink. There is no other explanation under the sun for the fact that the flood waters of 1892 did not reach Salton Sink and increase the size of the sea then there. From 1891 to 1905 there was an annual summer flood, and during some of those years there was a spring flood. The flood waters for all those years was spread over a territory extending for miles back from the banks of the river. If it were worth the time, we could refer the Court to the testimony of Sexsmith to the effect that in a period of six weeks willows would sprout and reach a height of two feet in intake No. 1. If vegetation will grow as rapidly as that, who is to say what was the effect of the vegetation produced by the overflow water for all those years in the country extending for miles back from the banks of the river and which, at the time defendant cut the third intake, was, in fact, covered by a very thick growth? Who is to say that when the flood of 1905 would have occurred, in the ordinary course of nature, it would not have found the country and the old channels so overgrown with vegetation of all kinds as that it would have been impossible for the water to cut a channel through to the sink? Who is to say that it, like the floods of previous years, would not have been held back and in the course of time have been lost by evaporation and seepage? However, the more we discuss this phase of the case, the deeper we get into the realm of speculation.

DAMAGES

In appellant's brief is a mild criticism of the conclusion announced by the Court below on the subject of damage suffered by complainant. It is said that in awarding damages for buildings, machinery, etc., destroyed, the evidence was *mainly* directed to the point of the cost of reconstructing the buildings.

Without going into the matter at length, it would seem that the cost of reconstructing the buildings would, inasmuch as they were in actual use at the time the destruction took place, be *prima facie* evidence of their value. However, this criticism is not just, as will readily appear from a reading of the testimony of Drury (Trans., pp. 558-599), which shows the value of the buildings.

Frederickson (Trans., pp. 512-550) stated what the cost of construction would be. This, and some slight testimony given by Sherman and Henton, was the only testimony offered on the subject of damage caused by destruction of buildings and improvements. Defendant did not attempt to question the correctness of any part of the testimony with reference to damages.

As to the salt crust. Henton (Trans., pp. 623-630) and Sherman (Trans., pp. 470-473) state the quantity of salt on the lands of complainant. This was not questioned or contradicted by any testimony on the part of defendant. Sherman (Trans., p. 476) said that after the land was covered with water, he made tests for the purpose of determining whether there was any salt crust left; that he found nothing but mud and silt. On page 477 he said the salt was now all dissolved. He

also said that, when the water subsides, the lowest portions of the sink will be covered with a salt formation again, and the amount of commercial salt will depend upon how that deposit is made. That if the salt deposits slowly and carefully, a commercial article will result. If the deposition takes place when storms prevail, the salt will be so mixed with sand and silt as to be practically useless for commercial purposes. The witness also testified that the lands of complainant were not the lowest lands in the sink. It should not be overlooked that more than twenty years will go by before the water will have disappeared from complainant's land. That the *salt crust* was destroyed no one will deny.

It is suggested that it is not certain that, in the estimate of one million five hundred thousand tons of salt on the land of complainant, the witnesses were not including the salt crust on section 22. There is absolutely no foundation for this criticism. Sherman and Henton testified to the quantity. The former said that covering the whole of section 23, that is to say, one mile square, the salt was from one foot to eighteen inches in depth. This would make an average of fifteen inches. He also gave the weight of the salt per cubic foot, and it simply requires an arithmetical calculation to show that there was more than one million tons on that section. Henton (Trans., pp. 627-628) said, replying to the question as to how much salt there was on sections 15 and 23, that in his opinion there was a half million tons more than the figures given by Sherman. He also said (Trans., p. 625) the salt was worth from 25 to 50 cents

a ton, and that 25 cents was a very conservative estimate. The average of the figures given by him was thirty-seven and one-half cents per ton.

As has been said, there was no testimony contradicting, or tending to contradict, that of Sherman and Henton on this subject. It will hardly seriously be claimed that it did not make a prima facie case warranting the allowance made by the lower Court.

The criticism of complainant for failing to remove some of its salt and certain of its improvements to a point of safety, seems rather far fetched, and must proceed upon the theory that complainant should have known that defendant would continue to discharge water into the sink, and hence that any effort to remove the salt and buildings to points of safety would be unavailing. There is certainly nothing in the record to show or indicate that the salt which complainant had collected and placed in vats on section 22 was not its property and that it did not have the right to remove it. It was in possession of the salt and as against the defendant was unquestionably the owner of it.

Again it is suggested that the evidence of complainant did not proceed upon the true measure of damage, and it is said that the damage which was actually suffered was the difference between the value of the property before and its value after the flood, and that no proof of any such damage was offered. That is simply, in effect, another way of stating the rule which was adopted by the Court. The land,—in addition to its value for purposes other than the gathering of salt,—was the value

of the salt deposit and the value of the buildings and other improvements, and to the extent to which the salt and the buildings were destroyed, the value of the land was lessened. We cannot conceive what more reasonable theory could have been adopted by the Court in arriving at what the complainant's damage actually was. That the damage actually was as found by the Court, no one can read the record and be in doubt. To say, therefore, that complainant was not entitled to a judgment for the damages awarded by the Court is to say that a Court of equity was impotent to render complete relief.

Respectfully submitted,

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No. 1584.

United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

The California Development Company,
Appellant,
vs.
The New Liverpool Salt Company, (a corporation),
Appellee.

UPON APPEAL FROM THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF SOUTHERN CALIFORNIA.

CLOSING BRIEF OF APPELLANT.

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STATEMENT.

It is conceded that inasmuch as the suit was brought on the equity side of the court, the decree must be reversed and the bill dismissed unless it be established that under the allegations and proof, complainant was at the time of the commencement of the suit, entitled to equitable relief.

It will not be attempted by present counsel in this brief to add to the convincing argument contained in the

opening brief of counsel for the appellant upon the two propositions,

First: That the destruction of complainant's property was not occasioned by the act of the defendant, but by the act of God; and

Second: That the jurisdiction of the Circuit Court sitting as a court of equity did not draw to it the cognizance of the damages.

But, it will be earnestly insisted that, conceding defendant's liability for the inundation of complainant's property, nevertheless, under the allegations of the bill and the proofs, complainant was not at the time of the filing of the bill entitled to injunctive relief, and that therefore the decree should be reversed and the bill dismissed.

The allegations of the bill with respect to the diversion of the waters of the Colorado river by the defendant are interpreted and controlled by paragraph 12, which appears at page 67 of the transcript of record.

While it is alleged in paragraphs 5, 7 and 8 that the defendant at the time of the commencement of the suit, was diverting waters from the Colorado river in such manner and quantity as to establish a lake in the Salton Sink, and destroy complainant's property and business, it is in said paragraph 12, alleged as follows:

"That defendant, in the construction of its said in-
"takes, has made no provision whatsoever for the control
"or regulation of the amount of water diverted by it into
"said intakes, and unless it be required to construct head-
"gates for the controlling and regulating of the amount
"of water flowing into its said canal, the said water will

"continue to flow through said canal in amounts greatly "in excess of that required for any proper use, and will "flow into the said lake and upon the lands of complain- "ant and destroy and ruin the property and business of "said complainant."

The intakes referred to in said paragraph are the three intakes which it is alleged in paragraph 5 that the defendant constructed for the purpose of diverting the waters of the Colorado river into its canals. It fol lows therefore from the allegations of the bill, that the diversion complained of will necessarily continue, with the consequent destruction of complainant's property, unless the defendant, by process of court, be compelled to close such intakes or construct headgates.

It further follows that any injunction would be ineffective and futile, unless such injunction, either directly or indirectly, should require the defendant to construct headgates or close the intakes.

It is respectfully contended that the complainant was not entitled to injunctive relief at the time of the filing of the bill, for the following reasons:

I.

THE CIRCUIT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA HAD NO JURISDICTION TO DECREE AN INJUNCTION IN EFFECT ABATING A NUISANCE CAUSED BY THE CONSTRUCTION OF INTAKES IN THE REPUBLIC OF MEXICO.

II.

THE CIRCUIT COURT HAD NO JURISDICTION TO COMPEL THE DEFENDANT TO CONSTRUCT HEADGATES

IN THE REPUBLIC OF MEXICO FOR THE REASON THAT THE DEFENDANT WOULD NOT HAVE BEEN PERMITTED BY THE LAWS OF THE REPUBLIC OF MEXICO TO CONSTRUCT SUCH HEADGATES.

III.

THE EVIDENCE DOES NOT ESTABLISH THAT THE DEFENDANT WAS COMMITTING A CONTINUING NUISANCE OR TRESPASS, AND THEREFORE PRESENTS NO CASE FOR AN INJUNCTION. THE REMEDY OF THE PLAINTIFF, IF ANY, WAS FOR DAMAGES IN AN ACTION ON THE CASE.

IV.

THE DEFENDANT WAS NOT DIVERTING OR THREATENING TO DIVERT WATER FROM THE COLORADO RIVER AT THE TIME OF THE COMMENCEMENT OF THE SUIT, AND THEREFORE NO INJUNCTION SHOULD HAVE BEEN ISSUED RESTRAINING THE DEFENDANT FROM DIVERTING THE WATERS OF SUCH RIVER.

V.

THE COURT WAS WITHOUT JURISDICTION TO DECREE AN INJUNCTION BECAUSE IT APPEARED FROM THE EVIDENCE THAT AT THE TIME OF THE COMMENCEMENT OF THE SUIT AN INJUNCTION TO SAVE COMPLAINANT'S PROPERTY FROM DESTRUCTION WOULD HAVE BEEN INEFFECTIVE AND FUTILE.

VI.

FROM THE ASSUMPTION THAT THE COMPLAINANT WAS NOT ENTITLED TO AN INJUNCTION TO PROTECT FROM DESTRUCTION ITS BUILDINGS, MACHINERY AND SALT BEDS, THE CONCLUSION INEVITABLY

Follows that It Was Not Entitled to Any Injunction at All.

VII.

The Injunction Was in Effect a Mandatory Injunction. A Court of Equity Rarely Decrees a Mandatory Injunction Requiring the Performance of Constructive in Contradistinction to Destructive Work and Will Never Decree a Mandatory Injunction When the Work Commanded to Be Done Requires in Its Execution Such Skill, Judgment and Technical Ability as Was Required to Close the Intakes Complained of.

VIII.

The Court Had No Jurisdiction to Decree an Injunction in This Suit in the Absence of a Determination at Law that the Acts of the Defendant Complained of Constituted a Nuisance.

IX.

There Is No Allegation or Proof that the Defendant When Able to Control the Waters of the Colorado River at Any Time So Used Them as to Permit Waste Water to Flow Upon the Lands of the Complainant. Therefore, Inasmuch as the Headgate Had Been Constructed and the Intakes Closed Prior to the Trial and Decree, Whatever May Have Been the Power of the Court to Retain Jurisdiction for the Purpose of Awarding Judgment for Damages, It Had No Power to Degree an Injunction and Thereby Restrain

THE DEFENDANT FROM PERFORMING ACTS WHICH IT HAD NEVER DONE OR THREATENED TO DO.

The sufficiency of the foregoing reasons will be considered *seriatim*.

I.

The Circuit Court for the Southern District of California had no jurisdiction to decree an injunction in effect abating a nuisance caused by the construction of intakes in the Republic of Mexico.

The allegation is:

"That defendant has constructed upon said Colo-"rado river three intakes for the purpose of diverting the "waters of said Colorado river into the canals above "mentioned and by means of said intakes and canal has, "for many months, been, and still is, diverting from said "Colorado river a stream of water, etc." [Par. V, p. 63, transcript.]

It will be observed that the *locus* of said intakes is not set forth in the bill. In its answer the defendant denies the allegation as set forth in the bill, and alleges,

"That the water referred to in complainant's bill "* * * was diverted from the Colorado river in Mex-"ico by that certain corporation, organized under the "laws of the Republic of Mexico," etc. [p. 105].

Intake No. 1 was constructed in December, 1902; intake No. 2 in June, 1904; and intake No. 3 was completed October 6th, 1904. The flooding of complainant's land did not commence until after the construction of intake No. 3.

Intake No. 1 was in California, and intakes Nos. 2

and 3 were in the Republic of Mexico. [Testimony of Duryea, p. 302; testimony of Sherman, p. 442.]

Duryea testifies that on the 15th of February, 1905, 450 second feet of water were running through intake No. 1; 896 through intake No. 2, and 1143 through intake No. 3 [p. 300]. He next visited the intakes in June, but does not testify as to whether, at such time, intake No. 1 had been closed or not.

The testimony of Sherman is to the same effect except that he made a third visit to the intakes in October or November, 1905, and that at such time No. 1 had been closed. [P. 461.]

Rockwood testifies:

"I found that the river began to rise very rapidly on "the 14th of March, and reached a height of 30.3 feet on "the 20th of March, and a height of 27.35 feet on the "17th of March." [P. 1245.]

He then testified as follows:

"Q. Did that March flood (referring to the flood with "respect to which he had testified as above quoted) have "any effect on the upper and the second intakes?

"A. *The upper intake, No. 1, had been closed at that "time.* It had no effect on intake No. 2 except tempo- "rarily. It did not scour it off permanently. As soon as "the water began to fall again it silted up." [P. 1247.]

This bill was filed in the Circuit Court on the 16th day of June, 1905.

It is thus conclusively established by the uncontradicted testimony, that while an unsubstantial amount of water was flowing through intake No. 1 on the 15th of February, 1905, such intake had been closed prior to

the 14th of March, 1905, more than two months before the filing of the bill in the Circuit Court.

At the time, therefore, of the filing of the bill, no water was being diverted from the Colorado river except through two intakes, designated as intakes Nos. 2 and 3, both of which were in the Republic of Mexico. Hence, at the time of the filing of such bill, admitting its every allegation to be true, and every contention of counsel for the appellee to be well founded, nevertheless, complainant was not entitled to an injunction unless it should be further ascertained that the Circuit Court of the United States, for the Southern District of California, had jurisdiction to compel the defendant to abate a nuisance caused by an obstruction, and the necessary result of an obstruction (paragraph 12 bill above quoted) created and existing in the Republic of Mexico.

It is well settled that a court of chancery has no such jurisdiction:

In the case of

Northern Indiana R. Co. v. Michigan Cent. R. Co., 56 U. S., 15 How., 14 L. Ed. 674,

it appeared that a railway company in Michigan, incorporated under the laws of that state, made an agreement with a railway company in, and incorporated by the laws of, Indiana, whereby the latter agreed that the former might build and operate a road in Indiana under the charter of the latter. Another railway company, also established by the law of Indiana, claimed the exclusive right to construct and operate a road in that part of Indiana, and it brought a suit in the Circuit Court of the United

States for the district of Michigan against the Michigan road, in which injunction was sought to restrain that company from constructing a road under the contract, in violation of the exclusive right claimed by the plaintiff. In disposing of the case the court said:

"In this case we shall consider the question of jurisdiction in regard to the district only. In all cases of contract, suit may be brought in the Circuit Court where the defendant may be found. If sued out of the district in which he lives, under the decisions he may object, but this is a privilege which he may waive. Wherever the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject matter in controversy is local, and lies beyond the limit of the district, no jurisdiction attaches to the Circuit Court sitting within it. An action of ejectment cannot be maintained in the district of Michigan, for land in any other district. Nor can an action of trespass *quare clausum fregit* be prosecuted, where *the act complained of was not done* in the district. Both of these actions are local in their character, and must be prosecuted where the process of the court can reach the *locus in quo.*" (56 U. S., at p. 242.)

It was insisted in that case that the court having jurisdiction of the persons could enforce its judgment by acting upon them; but, after indicating the class of cases in which the court could thus enforce its judgment, the court said:

"It will readily be admitted that no action at law could be sustained in the district of Michigan, on such

"ground, for injuries done in Indiana. No action of "ejectment or for trespass on real property could have "a more decided local character than the appropriate "remedy for the injuries complained of. And is this "character changed by a bill in chancery? By such a "procedure we acquire jurisdiction of the defendants; "but, the subject-matter being local, it cannot be reached "by a chancery jurisdiction exercised in the state of "Michigan." (At p. 244.)

The case of

Mississippi & Missouri Railroad Company v. Ward, 2 Black 485,

was an appeal from the District Court of the United States for the district of Iowa. Ward filed his bill in the District Court charging the railroad company with having created a nuisance by erecting a bridge across the Mississippi river at Rock Island, and prayed that the nuisance might be abated. It appeared that the boundary line between the states of Iowa and Illinois was the center of the Mississippi river; that one-half of the bridge was in Iowa and the other half in Illinois. The District Court rendered a decree in favor of the complainant and ordered that so much of the bridge as was in Iowa should be abated.

It was never contended that the court had jurisdiction to abate the nuisance so far as the same existed in Illinois. The U. S. Supreme Court reversed the decree of the District Court, and stated (p. 493):

"The United States District Court holden in Iowa "exercised the same jurisdiction that a state court of "Iowa could have exercised and no more. It had no

"power beyond the middle of the river. On that part of "the bridge within Iowa, and its piers, the court below "acted and ordered that the structure should be removed. "* * * The bridge is 1570 feet long and the number "of piers is six, three of them are on the Iowa side of "the river, the draw pier is fourth * * * the Illinois "draw passage is directly over the deepest channel of "the river and directly over the usual track of steam-"boats before the bridge was built. * * *

"An indictment could only have been prosecuted "against the owner for keeping up the nuisance in Illi-"nois in the courts of that state, because the nuisance "was a trespass and crime against the law of Illinois, "and the injuries to the complainant's boats giving him "the privilege to sue and abate the obstruction was as "local as the public right to indict. He asks nothing "from the person of the defendant, but seeks to remove a "local object because he has sustained special damage "from that object.

"The District Court had no power over the local ob-"ject inflicting the injury; nor any jurisdiction to inquire "of the facts, whether damage had been sustained, or "how much. These facts are beyond the court's juris-"diction and powers of inquiry, and outside of the case.

"The District Court ordered three spans of the bridge "and three of its piers to be removed, extending to mid-"dle of the river; and what would be the consequence if "we were to affirm that decree? It would, as a conse-"quence, render the bridge useless throughout, but it "would not materially remedy the nuisance complained "of. The navigation would certainly not be improved

"so far as the complainant is concerned by removing the "Iowa end of the bridge. The cross currents alleged to "exist would remain; the large eddy at the lower end of "the long pier, and the obstruction to the Iowa draw "passage by the eddy, would still remain." (P. 494.)

The fact that the lands injured by the alleged act of negligence, to-wit, the construction of intakes 2 and 3, are situated in California, does not give to the courts of California the required jurisdiction.

The principle is very learnedly discussed by the Supreme Court of Wisconsin in the case of

In re Eldred, 46 Wis. 530, reported in 1 N. W., p. 175.

In that case the court arrived at the conclusion that where a dam was maintained in one county which created a nuisance in another, an indictment for creating and maintaining such nuisance should be tried in the county where the dam was erected, that being the county where the offense was committed; and that an indictment in the county where the nuisance existed was improper.

On the authority of this case, and of the decisions of the Supreme Court of the United States above cited, the Supreme Court of Iowa rendered a decision upon facts in all respects parallel to those at issue upon this appeal.

In the case of

Gilbert v. Moline Water and Power Company, 19 Ia., p. 319,

it appeared that Gilbert was the owner of lands in the state of Iowa; that the Moline Water & Power Company had constructed a dam in the

Mississippi river, by reason whereof such lands of Gilbert in Iowa were flooded and injured. Gilbert brought suit in the Iowa court, and having obtained personal jurisdiction over the power company, asked for an injunction restraining the company from maintaining such dam. The dam was situated in the state of Illinois.

The Supreme Court of Iowa held that the courts of Iowa had no jurisdiction to compel the defendant to remove the dam.

This case was approved by the same court in the case of Buck v. Ellenbolt, 84 Ia. 394, 51 N. W., p. 22.

See also to the same effect the case of

Texas & P. R. R. Co. v. Gay, 86 Tx., p. 371; 25 L. R. A., p. 57.

The principle would appear to be that a court of equity can never compel a defendant to do anything which is not capable of being physically done within the territorial jurisdiction of the court.

A defendant in California may be compelled by the courts of California to convey property in Great Britain; for the act which he is required to perform, to-wit, the execution and delivery of the conveyance, may be done in California, and the court may hold the defendant in custody until he complies with its order and executes the conveyance; but a court of equity will not undertake to compel the defendant to do something, the very doing of which requires that he be released from custody and go outside of the court's jurisdiction in order to perform such act.

The principle as thus stated is set forth in the case of

Munson v. Tryon, 6 Phila. 395,

as follows:

"It is argued, however, that even if there is jurisdic-"tion over the parties, there is none of the cause. I "am moved to enjoin against the commission of acts in "the nature of waste upon lands outside of the county "* * * my order or decree affects the defendants per-"sonally. It is only indirectly, and through the defend-"ants that it affects the lands. It has often been decided "that when a chancellor obtains jurisdiction over a party "he may make a decree that affects lands even in a for-"eign country. It is true, too, that to justify a court in "interfering and exercising a jurisdiction in cases relat-"ing to lands where the court cannot send its process, the "relief sought must be such as the court is capable of "administering in the case before it. For this reason it "was ruled by Judge King in the Court of Common Pleas "of Philadelphia that the court had no jurisdiction of a "bill complaining that defendant had set up and main-"tained a nuisance, affecting plaintiff's lands, in Mont-"gomery county. The reason assigned for this ruling "was, that no obedience of the defendant or act of his "could execute the necessary decree. The wrong done "was the creation of a nuisance. The only remedy was "abatement, and the Common Pleas could not send pro-"cess to abate the nuisance. * * * Jurisdiction is en-"tertained in equity over extra territorial torts when the "court has full power to execute its decree where the "appropriate decree operates on the future conduct of

"the defendant and not directly upon the property "threatened to be injured. When a nuisance has been set "up and abatement decreed, in order to carry the decree "into effect, a writ of assistance or other similar process "may be necessary. Such a writ cannot be sent into a "foreign jurisdiction, and therefore, in such a case, be- "cause a court of equity cannot complete its work, it will "not commence."

The distinction is well stated in the very carefully considered case of

Poindexter v. Burwell, 82 Virginia 507, at p. 513.

There it was held that the doctrine is that if the person to do the act decreed is within the jurisdiction of the court, and the act may be done without the exercise of any authority operating territorially within the foreign jurisdiction, the court may act in *personam,* and oblige the party to convey, or otherwise to comply with its decree. But it is not competent to the court to decree touching a foreign subject when the act to be done can be accomplished and perfected only by an authority operating territorially.

See also,

Pomeroy on Equity Jurisprudence, Sec. 1318.

The force of this position is not affected by the fact that the suit was commenced in the Superior Court of California on the 8th day of March, 1905, six days before the 14th of March, when the March floods occurred, prior to which floods intake No. 1 had been closed.

It is believed that the right of the complainant to an injunction will be determined as of the date when by

filing its bill on the equity side of the court it elected to rely upon its right to equitable relief rather than to prosecute its action at law for damages.

But if it be held that its rights are to be determined as of the date when it commenced its action in the Superior Court even then it had no rights founded upon intake No 1.

It is true that there is no direct testimony as to whether intake No. 1 was open or closed on said date.

It is obvious, however, from the entire record, that the by-pass around the headgate on American soil, which by-pass has been designated intake No. 1, was in no sense the cause of any injury to complainant. It had been open since December, 1902, and had never caused any injury to any property, and it had always been closed without difficulty before the spring floods.

All the evidence shows that the trouble, if occasioned by any act of the defendant, was occasioned by the construction of the third intake. The third intake "gave the water a higher and steeper course toward the valley." [P. 2090.]

"In June, 1904, Rockwood stated to Mr. Heber that "he believed they would have to take the chance and cut "a third intake from the river to the canal * * * "stating that as the fall of the canal was so much more "rapid than the fall of the river he believed there would "be no trouble in keeping the intake open." [Statement of Meserve to secretary of state offered in evidence by counsel for complainant, transcript, page 2154.]

All the records and photographs produced by plaintiff

show that the alarming conditions were at or about intake No. 3.

Therefore, even if it had been affirmatively established that intake No. 1 was open at the commencement of the action in the Superior Court and had remained open, nevertheless an injunction should not have been decreed because there was no evidence that the diversion at this point endangered complainant's property.

It is submitted, moreover, that the presumption raised by Duryea's testimony to the effect that on the 15th of February, 450 seconds of water were flowing through intake No. 1, is at least met by Rockwood's testimony above quoted, which is uncontradicted, that intake No. 1 had been closed before the March flood. The March flood, as has been stated, commenced on the 14th of March. Rockwood commenced work immediately after the February floods receded, and it would be unreasonable to infer from the facts, that the closing of intake No 1 had not been consummated prior to the 8th day of March.

The complainant made no effort to establish that such intake was open at the time of the commencement of the action in the Superior Court.

The injunction should not be granted unless complainant establishes the facts upon which it must depend by clear and indisputable testimony. This is a well recognized principle of law, and is fortified by many decisions cited in appellant's opening brief.

The burden was upon the complainant to prove that its property was imperiled by reason of intake No. 1 at the time of the commencement of the action. It can-

not be claimed with any sincerity or candor that this fact has been proven.

Furthermore, immediately after the February floods receded, which, according to Duryea's testimony was about February 15th, Rockwood instructed Sexsmith to close the intakes.

Sexsmith testified with respect to intake No. 1:

"It was an easy thing to close it." [P. 916.]

Therefore there can be no presumption from the fact that it was open on February 15th that it remained open until the 8th of March. In the absence of any testimony whatever on the subject, proof that it had been open on the 15th of February might raise the presumption that such condition continued, and thus shift the burden; but such presumption, if any, is neutralized by the proof that it had been closed prior to the 14th of March, especially when such proof is considered in connection with the uncontradicted testimony that it was Rockwood's purpose and plan to close it, and that he commenced to do so immediately after the February floods receded.

Furthermore, there is no allegation or proof that the California Development Company was at the time of the commencement of the action maintaining said intake No 1. The proof that it had been closed within at most, six days after the commencement of the suit, and remained closed until October, 1905, as testified to by Sherman, and has remained closed ever since, so far as the record discloses, is conclusive that at the time of the commencement of the suit the California Development Company must at least have been engaged in a compe-

tent effort to close it, and that therefore the intervention of a court of equity was uncalled for, and would have been improper.

If the foregoing reasoning with respect to intake No. 1 should not be satisfactory to the court, then attention is called to the quotation from the decision of the Supreme Court of the United States in the case of Missouri & P. R. R. Co. v. Ward, *supra,* wherein that court reversed the decree of the Circuit Court, directing the pulling down of such of the piers of the bridge as were within the territorial jurisdiction of the court, basing such reversal upon the ground that the pulling down of such piers would not put an end to the nuisance complained of, and while injurious to the defendant would not materially benefit the complainant.

Conceding that at the time of the commencement of the suit intake No. 1, such as it was, was still open; even then it would have been error for a court of equity under the principle laid down by the Supreme Court of the United States to direct the closing of that intake when it was without jurisdiction to reach the substantial cause of the nuisance, to-wit, the intake in the Republic of Mexico.

Without respect to the evidence the bill was fatally defective in that the locus of the intakes was not alleged. It was incumbent upon complainant to show to a court of equity by the averments of its bill, both that the court ought, and had the power, to grant its prayer. The mere allegation that the defendant had in some unspecified place, created a nuisance, is not sufficient to invoke the equitable power of the court. In as much as

a court of equity is without authority to abate a nuisance beyond its jurisdiction, the complainant should have alleged that the place of the nuisance was within the jurisdiction of the court.

Encyclopœdia of Pl. and Pr., Vol. 22, p. 780;
McKenna v. Fisk, 1 How. 241;
Bank v. Lane, 80 Maine 165.

"It is just as necessary and for the same reason to "aver the fact requisite to show that the court has jur- "isdiction of the plaintiff's suit as to allege sufficient to "demonstrate that there is not adequate remedy at law "and that there is redress in equity. The judgment of "a city court in an action in which cause of action is not "averred to have arisen within the city, is erroneous, "because the case is not brought within its jurisdiction."

Maples v. Wightman, 4 Conn. 376;
Griswold v. Mather, 5 Conn. 435;
Winford v. Powell, 2 Lord Raymond 1310.

Especially is this true of federal courts.

"The rule is inflexible and without exception, that the "facts upon which the jurisdiction of the courts of the "United States rests, must affirmatively appear in the "record of all suits prosecuted before them; and the jur- "isdictional facts must affirmatively appear at the com- "mencement of a suit, by a statement of them in the "declaration or bill of the party suing."

Bates on Federal Procedure, Sec. 125, p. 144.

"Hence when a plaintiff sues in a court of the United "States, it is necessary that he should show in his plead-

"ing that the suit he brings is within the jurisdiction of "the court and that he is entitled to sue there. And if "he omits to do this and should by any oversight of the "circuit court obtain a judgment in his favor, the judg- "ment would be reversed in the appellate court for want "of jurisdiction in the court below."

Dredd Scott v. Sanford, 19 How. 393, at pp. 401-402.

See also,

Ex-Parte Smith, 94 U. S. 455 at p. 456;
Bors v. Preston, 111 U. S. 252 at p. 255;
Hanford v. Davies, 165 U. S. 273, at p. 279;
Metcalf v. Watertown, 128 U. S. 586, at pp. 588-9.

The jurisdictional question here raised cannot be waived.

In the case of United States v. Crawford, 47 Fed. 561, the court, at page 566, says:

"The counsel for defendants filed no pleading setting "up the want of jurisdiction because of the failure of sub- "ject matter, but in argument they suggest there is a "failure of subject matter. This they may do, and the "court may act on this suggestion and dismiss the case. "* * *" It is the court's duty *sua sponte* to so act.

See also,

Yellow Aster Co. v. Crane Co., 150 Fed. 580.

II.

The Circuit Court had no jurisdiction to compel the defendant to construct headgates in the Republic of Mexico; for the reason that the defendant would not have been permitted by the laws of the Republic of Mexico to construct such headgates.

Counsel for appellee, at pages 66 and 67 of their brief, quote from Mr. Meserve's statement to the secretary of state, as follows:

"By the terms of the concession from the Mexican "government to the Mexican company it was provided "that no intake connecting with the Colorado river "should be constructed in Mexico until the plans of all "proposed structures were first approved by the proper "engineering authorites of Mexico."

It appears that the Mexican government granted the Mexican corporation, whose stock was owned by the defendant, certain concessions, which gave such company the right to divert water in Mexico from the Colorado river [p. 194]; that the company, however, had no authority to build headgates until the plans of the same had been approved by the Mexican government.

Rockwood, the engineer of the defendant, testifies that he had prepared plans for such headgates in the month of November, 1904, and that such plans had been sent to the City of Mexico for approval [pp. 1346-7]; but that they were not approved until December, 1905.

Schuyler testifies:

"The material was ordered for these gates at once, "and would have been put in—the gates would have "been put in in the fall of 1904, had permission been

"granted or the privilege been obtained from the Mexi-
"can government." [Pp. 1311-12.]

"Q. And as consulting engineer for the company,
"there is no reason that now suggests itself to your mind
"why that gate was not constructed within ten weeks
"from the time when the river bank was cut so as to al-
"low to flow into the canal?

"A. The only reason that I know is the fact that the
"Mexican government had not approved the plans for the
"gate.

"Q. Then, not knowing whether they were going to
"be permitted to put a gate in there at all, and knowing
"that high water would come at some time, they never-
"theless cut the canal? Is that your understanding of it?

"A. I don't know about their knowledge as to what
"the government of Mexico might do in the matter of the
"approval of the plans, but they were friendly with the
"government and had received concessions from them
"and had every reason to expect that the approval of the
"plans would be immediate upon their filing." [Pp.
1316-1317.]

It is well settled that no court of equity in the exercise of jurisdiction over the person of a defendant will compel him by imprisonment or like coercion to convey property, when by the laws of the country where the property is, no right to such conveyance existed.

> Texas & Pac. R. R. Co. v. Gay, 25 L. R. A., at top p. 50.

This principle has been well established in numerous cases and is based upon sound logic. The decree of a court of equity in California compelling a conveyance of

property in Mexico or New York cannot of itself affect the title to such property.

Watkins v. Holman, 16 Peters, at p. 57.

The California court can only compel the execution and delivery of the conveyance. The grantee may make such use of such conveyance in Mexico or New York as will pass to him the title to the property conveyed. If, however, under the laws of Mexico or New York, such conveyance would be invalid, and this should be established as a fact to the satisfaction of the California court, then the California court would not decree such conveyance, because such decree would be useless and futile.

Inasmuch, therefore, as under the evidence the defendant at the time suit was commenced was not authorized by the laws of Mexico to construct the headgates which the *complainant has alleged were the only means of stopping the destruction of its property* [bill, paragraph XII, p. 67], the court was without jurisdiction to compel it to do so.

In other words, at the time of the commencement of the suit, the defendant was not unconscientiously refusing to construct the required headgate. It had no authority at law to construct it. Grant that the cutting of the intakes in June and October under such circumstances was even criminal negligence, as charged by counsel for the appellee, nevertheless such act of criminal negligence had been done, and the defendant, while liable to the complainant in damages therefor, was, under the laws of Mexico, powerless despite the best of intentions, to construct such headgates, and save com-

plainant's property from destruction. Such destruction was complete in October, 1905, two months before the Mexican government granted the permission applied for.

Under such circumstances, at the time of the filing of the bill, complainant was not entitled to equitable relief, and had no remedy except its action at law for damages.

Even the general rule that equity will by acting in *personam*, compel the specific performance of a contract, is subject to the recognized exception, that where the contract involves work or skill to be done on foreign soil, according to foreign law, as would the construction of the headgates in question, equity has no jurisdiction.

Port Royal R. R. Co. v. Hammond, 58 Ga. 503;

III.

The evidence does not establish that the defendant was committing a continuing nuisance or trespass, and therefore presents no case for an injunction. The remedy of the plaintiff, if any, was for damages in an action on the case.

There is but little, or no conflict as to any of the material facts and occurrences subsequent to the diversion of the waters of the Colorado river by the California Development Company. What conflict there is consists chiefly in the differing opinions of experts as to what the Colorado river would have done under certain circumstances.

There is no allegation in the bill, nor was any evidence adduced, to the effect that the California Development Company at any time assumed the right to divert waters of the Colorado river without regard to the ef-

fect of such diversion upon the property of the complainant. Nor does counsel charge that the California Development Company ever assumed to claim, or to undertake the exercise of, such a right.

The tendency of complainant's evidence and the charge of counsel are that the California Development Company, prompted by the desire to furnish large quantities of water to the people in the valley quickly and without expense, constructed these intakes recklessly and without such prudence and skill as was required of it by law.

The California Development Company cut an intake 60 feet wide for the purpose of diverting water.

It is not claimed that a 60-foot wide cut would convey sufficient water to occasion waste enough to damage complainant's property.

It is conceded that the California Development Company did not intend that such intake should be widened; that its purpose was not to widen and enlarge it; that its intent was (in the event that a headgate could not be constructed before the summer floods) to close up this intake entirely, and that its reasonable expectation, based upon past experience, was that it would be able to fill it up with little difficulty before the floods.

As a matter of fact, however, the huge floods of the Colorado river swept through this intake *and enlarged it.*

The enlargement was the act of the Colorado river, and not the act of the California Development Company

It is not contended here, and now, while pursuing this line of thought, that the construction of the 60-foot wide

intake was not the proximate cause of the enlargement, but it is merely insisted that, as a matter of fact, the California Development Company did not construct the enlarged intake.

The flooding of complainant's land was due to the enlarged intake. But for the fact of this enlargement, such flooding and the destruction of the complainant's property would not have taken place.

The enlargement did not exist in consequence of the desire or will of the California Development Company; it was in no sense maintained by the California Development Company. The California Development Company did not claim or contend that it had the right that this enlarged intake should continue. On the contrary, it existed against its wish and the California Development Company, by the use of all its resources, was endeavoring, prior to and at the time of the filing of the bill, to close it up. Wherefore, then, necessity or occasion for the intervention of a court of equity?

Concede for the purpose of argument that such enlargement and the consequent destruction of complainant's property was caused by the act of the California Development Company, and this is all that counsel for the complainant claim. There follows, as has been said, liability on the part of the California Development Company in an action for damages, but no ground or excuse for action by a court of equity.

The basis of an injunction, whether prohibitory or mandatory, is the intent of a party to keep on doing something which injures another.

One erects a dam and claims the right to have the

dam remain where constructed. The consequence of the construction of such dam is the flooding of plaintiff's property, and so long as such dam remains there, such flooding will continue. The complainant asks the court of equity to force the party who constructed *and maintains* the dam, to remove it.

It is the maintenance of the dam which gives the court of equity jurisdiction. Each day and minute that such dam remains and is maintained by the defendant, it is a menace to the complainant's property, and each flood by reason thereof, a nuisance; and in all cases where a court of equity has ordered such dam to be removed, the gravamen of the action has been the settlement of the conflicting rights of the respective parties. In all such cases the defendant has claimed that he had the right that the dam should remain there, and even though not performing physical acts of maintenance, was by his attitude and contention with respect to it morally keeping it there. The principle has been well stated in the following language:

"The fundamental province of the injunction is to "prevent a MEDITATED wrong, and not to redress an in-"jury."

Palmer v. Foley, 45 How. Pr. 110 at p. 118.

In this case the defendant was meditating nothing, was maintaining nothing, and was asserting no right. Grant that it had committed a wrong.

Suppose for purposes of illustration that a party had negligently thrown a lighted cigar into combustible material; that the same had taken fire, and that complainant's property was either destroyed or in process of de-

struction. The complainant, of course, would have his action at law for damages. But will it be seriously argued that a court of equity would undertake to compel the man who threw the cigar either to put out the fire or to rebuild complainant's house?

If the allegation and proof in such case had been that the defendant threatened to throw a lighted cigar into such combustible material frequently and at will, then a case for injunction might have been made out, and the decree would have been grounded not on the throwing of the cigar which had been thrown or on the fact of the fire which was raging, but upon the allegation and proof that the defendant, unless restrained, would throw more cigars and cause additional fires.

If in this case the complainant had alleged and proven that the defendant intended or threatened to construct other and further intakes of a dangerous character, then it would have been proper for a court of equity to restrain the defendant from constructing any further intakes unless the same were protected by suitable headgates.

But there is no such allegation or proof or charge by complainant's counsel.

NO CONTINUING ACTS OF TRESPASS WERE PROVEN AND NO THREATS TO CONTINUE ANY ACTS OF TRESPASS WERE EITHER ALLEGED OR PROVEN.

Three acts, to wit, the construction of the three intakes, not acts of trespass, but acts, which, under certain conditions might cause injury to complainant's property were alleged, and, if you please, proven.

Counsel for appellee, in his brief, at page 78, quotes from Hawgood's testimony:

" 'But if I had succeeded in doing it before, I would
" 'have attempted to do it again. If I had been success-
" 'ful I would be tempted to take chances on it.' "

And then counsel adds:

"Will anyone claim that yielding to *temptation* to "take *chances* in a work of this nature is good engineer-"ing? When an engineer takes chances in a business "of this nature he throws discretion and judgment to the "winds. It is true Rockwood said he took the chance "because he had done it successfully once. But that is "not sufficient reason why he should have shown such "hardihood a second time."

The cut of Intake No. 3 prior to the filing of the bill had been demonstrated to the satisfaction of Rockwood and everybody else not only to have been unsuccessful, but to have imperiled both complainants, and defendant's entire property and system.

As has been argued, Intake No. 1 had been closed successfully prior to the filing of the bill, and Intake No. 2, had been filled with silt by the March floods, and was of no serious import.

The conditions therefore which confronted the parties at the time of the filing of the bill were, that as the result of one, and possibly two, or even three acts of the defendant,—the consequence of which acts the defendant was at such time earnestly laboring to avert,—the property of the complainant was being destroyed. This was no ground for the interposition of a court of equity. A single allegation that the defendant, despite

this sad experience, would have again "taken its chances" and constructed other intakes, fortified by evidence sustaining such allegation, might have afforded counsel for appellee ground to argue that the facts of this case were such as to give a court of equity jurisdiction; but the absence of such allegation and evidence, not to speak of the overwhelming negation of it to be adduced from the entire trend of the testimony and acts of all the parties, precludes any suggestion that the complainant had any remedy except its action at law for damages.

IV.

The defendant was not diverting or threatening to divert water from the Colorado river at the time of the commencement of the suit, and therefore no injunction should have been issued restraining the defendant from diverting the waters of such river.

This point has been virtually covered by the argument just preceding.

The allegation in the bill that the defendant had constructed upon the Colorado river three intakes for the purpose of diverting the waters of the Colorado river into its canal, while sufficient in connection with the evidence as viewed by the district judge, to establish a basis for a money judgment, is of itself insufficient as a foundation for injunctive relief. And complainant's right to an injunction must depend upon its ability to prove the allegation of the bill that the defendant, at the time of the commencement of the suit, *was diverting* water from the Colorado river in such fashion as to work irreparable injury to the complainant.

In its answer, defendant denies the allegation that the defendant at such time was diverting waters from the Colorado river.

There is no evidence that at such time defendant, or anybody else, was diverting any waters whatever from the Colorado river.

The defendant had prior to October, 1904, done one, or perhaps three acts, which, if complainant's contention upon the merits be allowed, were the proximate cause of the flowing of the Colorado river on to complainant's lands.

The defendant committed no act of diversion of water after the 6th of October, 1904, and, as a matter of fact, prior to the commencement of the suit, had been engaged, at great expense in desperate efforts not only to control, but to *totally check* its diversion.

A court of equity, according to the old rule, operates by action upon the conscience of the individual. What unconscientious act was the California Development Company doing at the time of the commencement of the suit?

Granted that prior thereto it had been a sinner. Its acts were surely those of repentance, and its contrition and resolution to amend cannot be questioned. The conditions called for penance, but it was too late for prevention.

Complainant's remedy was an action at law.

In order to distinguish the connection of the California Development Company with the continuance of the flooding of complainant's lands from such acts of maintenance as are necessary to

establish the allegation in the bill that the defendant *"was diverting"* waters, let us, for purposes of illustration, assume that in February, 1905, the California Development Company had conveyed its properties and canals to a third party, and that such third party upon such conveyance in February, 1905, did each and every thing which the evidence shows that the California Development Company did subsequent to such date.

Complainant's remedy against the California Development Company for damages for the injury occasioned by the acts of the California Development Company prior to the conveyance, would have remained, and complainant would have had no action for such damages against the grantee; but complainant's right to an injunction being based as it necessarily must be based, upon allegations of what the defendant was doing at the time of the commencement of the suit, to wit, the 8th of March, 1905, would have been precisely the same against such grantee as against the California Development Company, and if not entitled to an injunction against said grantee, complainant could not be entitled to an injunction against the California Development Company.

If A construct a dam by reason whereof B's premises are flooded, and A then conveys his property and the dam to C, and the conditions are such that B is entitled to have the nuisance abated, he could maintain his suit against C to have the obstruction removed.

If A owns property and B erects a building under

such circumstances as wrongfully to interfere with A's air and light, and then conveys the building to C with notice, A would have the same right to have the building removed against C as he would have had against B.

If the nuisance be of that continuing character which is essential in order that a court of equity may by injunction abate it, then all those who succeed to the ownership of the obstruction which creates the nuisance are, in the absence of laches, subject to the operation of even a mandatory injunction.

It certainly will not be asserted that this complainant would have been entitled to any injunctive relief on the 8th of March, 1905, or at any time, against such supposed grantee. Such grantee's defense would have been simple and conclusive. The evidence contained in this record would have been established beyond peradventure, his denial that he was diverting water, and the bill would have been dismissed.

The distinction then between the acts of the California Development Company subsequent to February, 1905, and the acts of the man who maintained the dam which his predecessor in interest constructed, rests entirely in this: the California Development Company was when this suit was commenced in no sense maintaining the intake, while in the other case the grantee was maintaining the dam.

If in the suit against the grantee of him who had constructed the dam it had been proven that such grantee had never claimed the right to have the dam there, and had himself made many efforts to pull it down, and still wanted it pulled down, such proof would have been a

defense to the action, because the same distinction would then exist, and the evidence of maintenance, that is to say, of continuing acts of trespass, would be lacking.

V.

The court was without jurisdiction to decree an injunction because it appeared from the evidence that at the time of the commencement of the suit an injunction to save complainant's property from destruction would have been ineffective and futile.

Let it be conceded for the purpose of argument, that if at the commencement of the suit, the complainant was entitled to relief by injunction, the court had the right upon the trial, to award it any relief to which it was found to be entitled, even though by reason of occurrences after the commencement of the suit, the complainant's right to an injunction should have ceased before the trial and decree; and, let it be further conceded that if the complainant were entitled at the time of the commencement of the suit to the equitable relief asked for, the court had jurisdiction to award it a money judgment for damages. Nevertheless, we believe it to be settled law that in order to entitle the complainant to any relief in this suit, it is not sufficient that the bill alleged facts sufficient to entitle it to an injunction, but it was necessary for it to establish upon the trial that at the time of the commencement of the suit it was entitled to equitable relief.

In support of this we will re-quote from the decision of the United States Supreme Court a quotation set forth in appellant's opening brief, as follows:

"The rule is that where a cause of action cognizable

"at law is entertained in equity, on the ground of some "equitable relief sought by the bill which it turns out can- "not for defect of proof or other reason be granted, the "court is without jurisdiction to proceed further and "should dismiss the bill and remit the cause to a court "of law."

Dowell v. Mitchell, 105 U. S. 430.

See also cases cited in appellant's opening brief, page 158.

The fact that the bill contains allegations showing the complainant to be entitled to equitable relief, is not sufficient. While sufficient, of course, upon demurrer, the bill will be dismissed upon trial, if such allegations showing equitable jurisdiction are not established by the evidence.

Again we quote from an opinion quoted in appellant's opening brief:

"A moment's reflection will satisfy everyone that "nothing could be more mischievous than the adoption of "the principle contended for by the complainant. In such "case it would only be necessary for the defendant in an "action at law to make some pretense of claim against "the plaintiff in such action of fraud, mistake, accident "or right to an account, in order to change the forum "of litigation, and to compel the determination of ques- "tions purely legal in a court of equity."

Collier v. Collier, 33 Atl. 193, at p. 194.

It is alleged in the bill that the complainant is engaged in the mining and manufacture of salt; that it owns certain sections of land upon which are an extensive salt crust, and certain buildings and machinery used for the

mining and manufacture thereof. That owing to the diversion of the waters of the Colorado river by the defendant, the salt, buildings and machinery have been to some extent injured, but have been protected by dykes erected by complainant. That if the diversion of waters is stopped, the waters then encroaching upon such dykes will, by reason of climatic conditions, evaporate and disappear. That the amount of water in the Salton lake is constantly increasing, and "if such increase be not checked, will in *a short time* overflow said dyke." [Paragraph 8, p. 65.]

In conclusion complainant alleges that defendant will "unless restrained * * * continue to divert from the Colorado river large quantities of water * * * and thereby destroy the property and business of complainant, and occasion complainant great and irreparable injury."

It appears by the articles of incorporation of the complainant [p. 2077] "that the purposes for which it is formed are for mining, manufacturing, buying and selling salt and other minerals, and also purchasing and selling real estate."

The object of the suit is by injunction to protect from injury and destruction the buildings, machinery and salt beds necessary for the carrying on of the purposes of complainant's organization.

It is asserted on behalf of defendant that the evidence showed that the suit was commenced too late to save such property from destruction.

The evidence on this point is summarized in appellee's brief at pages 94 and 95. Upon the evidence so

summarized, counsel for appellee comment, at page 95, as follows:

"It appears from this testimony, which, as we have "said, is not contradicted, that by the 26th of March, "1905,—up to which date there had been no exceedingly "high water in the Colorado; at any rate, if high water "had prevailed it did not last for a protracted period— "the property of complainant was practically destroyed. "The record will be searched in vain for any explanation "of the cause of this great damage and injury to com- "plainant other than the reckless method pursued by de- "fendant in the conduct of its operations."

Drury, witness for complainant, also testified that the complainant abandoned all effort to save its property on March 10th, 1905. That on that date "the whole thing was swamped." [Tr., p. 602.]

The March floods, which, as above stated, commenced on the 14th of March, and during which the river attained a height of over thirty feet, rendered it physically impossible for the California Development Company or anyone, to close the intake prior to the 26th of March, the day fixed by counsel in their brief as the date when the property of the complainant was practically destroyed.

The defendant was, as a matter of fact, engaged in an effort to close the intake prior to such March floods, and immediately after the February floods; and an injunction could not have compelled it to do more than it was doing. Even if it should be argued that the defendant prior to such March floods was not proceeding to close the intake with proper dispatch and skill,

nevertheless, it remains true that no injunction issued on the 8th of March (assuming that the Superior Court had issued one *ex parte* upon the filing of the complaint in that court) could have, as a matter of fact availed, so that in pursuance of it other and more successful and expeditious plans for the closing of the intake could have been devised and put into execution prior to the flood commencing on the 14th of March, which, according to the undisputed testimony, would have undone all that might have been done prior thereto.

It is therefore an indisputably established fact, virtually conceded by appellee's brief, that at the time the suit was commenced even in the Superior Court of California, the destruction of complainant's property described in the bill, was inevitable.

The fact that it had not been totally destroyed on the 8th of March is immaterial, if on that date the conditions were such that its destruction was in the course of nature inevitable, despite any reasonable efforts of human agency to save it.

One may be enjoined under certain circumstances from burning material upon his own premises in such manner as to occasion the conflagration to spread and destroy the improvements upon the adjacent property of another, and if one threatens to burn material upon his own premises in such way, the owner of the adjacent property may, upon proof of such threats, enjoin him from so doing. But, if the first party has before suit brought, actually started the fire upon his own property, and as a result of it the conflagration has as-

sumed such proportions that it must inevitably extend to and consume the improvements upon the adjacent owner's property, a court of equity would not, at the instance of such owner of the adjacent property, issue an injunction of any kind, even though at the time of the request for the injunction the fire had not actually reached the property of such adjacent owner.

The point suggested is, that though the building, machinery and salt beds were not on the 8th of March totally destroyed, and were not in fact destroyed until the 26th of March, still, on the 8th of March the Colorado river was so far beyond control that no human agency could have arrested its floods in time to save complainant's property from annihilation.

Therefore, it is submitted as a proposition of fact established by the evidence, that the destruction of complainant's property had been virtually effected prior to the commencement of the suit and that no injunction could then lie for the purpose of saving such property, because any such injunction would have been as futile as King Canute's command to the tides of the ocean.

At the time the action was commenced, and prior thereto, the California Development Company found itself engaged in a life and death conflict with the Colorado river. It may be that the California Development Company by its recklessness in October, 1904, had, so to speak, breathed life into a Frankenstein, and brought this engine for destruction into existence; but the fact, nevertheless, was that this mighty force, however created, was at such time militant and overwhelming, and

the defendant was impotent to arrest it in its course of destruction.

Rockwood testified, referring to the conditions in the spring and summer of 1905:

"The more money we would have spent, the more "money would have been thrown away. I do not believe "that the expenditure of any amount of money at that "time could possibly have done any good." [P. 1260.]

The President of the United States, in his message to Congress upon the subject, which was put in evidence by counsel for complainant, summarizes the conditions as follows:

"There appears to be only one agency equal to the "task of controlling the river; namely, the Southern Pa- "cific Company, with its transportation facilities, its "equipment * * the need of railroad facilities and equip- "ment and the international complications are such that "the officers of the United States, even with unlimited "funds could not carry on the work with the celerity re- "quired. It is only the fact that the officers of the South- "ern Pacific Company acting also as officers of the Cali- "fornia Development Company, have been able to apply "all its resources for transportation, motive power and "the operation of the road that has made it possible to "control the situation to the extent which they have al- "ready done." [Tr., p. 2095.]

In its effort to close the intake the California Development Company having without avail, exhausted its own resources, turned over (as appears by the contract with the Southern Pacific Company in evidence, p. . . .) the entire control of its organization and its properties

to this great railroad system. It evinced by such contract its willingness to surrender its all; and withal the forces of the Colorado river remained unchained until January, 1907.

How futile then would have been a decree of the court compelling acts for the purpose of saving this doomed property. Such futility was, as a matter of fact, demonstrated before the trial by the total destruction of complainant's property in spite of the temporary injunction which was issued shortly after the filing of the bill.

(The temporary injunction is not printed, but it is referred to in the testimony, and, as a matter of fact, a copy of it has been certified and made a part of the record recently, and since the printing of the transcript.)

The principle contended for is stated by the Supreme Court of California as follows:

"If the destruction of the ditch be inevitable, as Clark "seems to think, irrespective of future work, we are un- "able to perceive how, by preventing the work, the ditch "can be saved from destruction. If the destruction must "come 'any way', we are unable to perceive how even a "court of equity can prevent it. Assuming then, that an "injunction would have been allowed, if it had been ap- "plied for at the time the work of defendants first threat- "ened injury to the ditch, we think it clear that the plain- "tiffs have delayed their application until it is too late. "So far as we can judge, an injunction would be ruinous "to the defendants, and of no benefit to the plaintiffs."

Clark v. Willett, 35 Cal., p. 534, at p. 548.

VI.

From the assumption that the complainant was not entitled to an injunction to protect from destruction its buildings, machinery and salt beds, the conclusion inevitably follows that it was not entitled to any injunction at all.

It is true as suggested by Judge Wellborn in his conclusions, that in addition to these buildings, machinery and salt beds, complainant owned its barren freehold; and it is admitted that under certain circumstances the owner of a barren freehold, without respect to its value, is entitled to injunctive relief. But it is confidently asserted that, in this suit, and upon the facts of this record, complainant was not entitled to injunctive relief for any such purpose.

While complainant does allege in his bill ownership of the soil, the entire theory of the bill is the apprehended destruction of the buildings, machinery and salt beds; and it is submitted that the complainant is bound in this action by such theory, and that therefore if the court should view favorably the contention of the defendant in the preceding point, the bill should be dismissed.

The purposes of the organization of the complainant are stated in its articles of incorporation as above quoted. The machinery and salt beds having been destroyed, the barren freehold could not longer be of use for the purpose of mining, manufacturing, buying and selling salt and other minerals.

It is true that complainant also had power by its charter to buy and sell real estate, although such fact is not set forth in the bill.

The entire evidence establishes the fact that the real estate in question had no value other than its salt beds, which, as has been argued, were at the time of the commencement of the action, doomed to inevitable destruction. Therefore, they had no value for purposes of sale. It follows that the complainant could not under its charter, use them for any purpose whatever.

All the earlier authorities, and many modern ones, hold that the allegation of ownership of property is not of itself sufficient to give a complainant equitable relief; that he must in addition set forth some facts tending to show that his remedy at law is not adequate, or that his damage is irreparable.

Admit, however, that the weight of modern authority is against this proposition, and that most jurisdictions, influenced chiefly by the disposition of the states, by statute, to disregard the distinctions between legal and equitable procedure, have held that a permanent injury to the freehold is *per se* a nuisance, and entitles its owner to injunctive relief. Still, it is asserted with confidence that no case can be found in the books where a court of equity has been induced to exercise this extraordinary power at the instance of a party who is in no way damaged by the alleged nuisance, unless the party committing the nuisance is doing so and threatening to continue to do so deliberately, wantonly or maliciously, unless, in fact, the nuisance is what some courts term a "pragmatic nuisance".

Especially is this true if the injunction sought is a mandatory injunction. The proposition that the injunction prayed for was in effect a mandatory injunc-

tion, and that the complainant was not, under the evidence, at the time entitled to a mandatory injunction, will be discussed presently, but in this connection, and proceeding upon the assumption as stated at the heading of this paragraph, that the complainant came to court too late to save its buildings, machinery and salt beds from destruction, the court is respectfully asked to strip from the bill all of its allegations with respect to buildings, machinery and salt beds,—as must be done if such assumption is well founded—and to consider whether any chancellor before whom the conditions as set forth in the evidence were faithfully presented, would decree the injunction here prayed for, at the instance of a complainant, whose prayer was this:

"I own some worthless land on the desert, of no use for any purpose or character whatever; and the California Development Company, not maliciously or wantonly, but imprudently and taking its chances, but inspired by the desire to serve quickly the needs—not the comfort, but the needs—of thousands of people, cut intakes into the Colorado river and as a result thereof, the channel of such river has been turned and the waters are flowing upon my worthless lands; but they are mine and while I am not using them and cannot use them, and they are not being damaged by this innudation, still they are mine and I demand that this court of equity do say to the California Development Company 'it is unconscientious that this condition be continued; and it is decreed that you, under penalty of imprisonment and punishment, expend hundreds of thousands or millions of dollars and close that intake."

Would any chancellor, ancient or modern, give such prayer consideration? Still, such is complainant's position in this suit, if it be a fact, as admitted by counsel for appellee in their brief, that at the time of the commencement of the suit complainant's machinery, buildings and salt beds were, as has been stated, doomed to inevitable destruction.

The principle that an injunction, and especially a mandatory injunction will not be granted when the damage to the party sought to be enjoined is heavy and the damage to the plaintiff relatively unimportant except in cases of pragmatic trespass, has been recognized by all courts.

McCarthy v. Bunker Hill & Sullivan Co., 147 Fed. 981;

High on Injunctions, Sec. 2, note;

In Murdock's Case, 2 Bland's Chancery, 461; 20 Am. Dec. 381.

In the case of Morris & Essex v. Prudden, 20 N. J. Eq., page 530, the court says, at page 540:

"The retention of the injunction will be of little bene-
"fit to complainant while it will work serious annoyance
"to defendants. An injunction ought not to be granted
"where the benefit secured by it to one party is but of lit-
"tle importance, while it will operate oppressively and to
"the great annoyance and injury of the other party, un-
"less the wrong complained of is so wantom and unpro-
"voked in its character as properly to deprive the wrong-
"doer of the benefit of any consideration as to its injuri-
"ous consequences."

In the case of Isenberg v. East India Company, 33 L. J. Equity, page 392, Lord Chancellor Westbury states the same principle, as follows:

"To what end then am I to exercise a jurisdic-
"tion, which, in such a case as this, would simply be mis-
"chievous to the defendants, without being attended with
"corresponding benefit to the plaintiff, unless, indeed, I
"could approve of the plaintiff's taking advantage of the
"mischief and loss that the defendants would have to
"sustain in order to aggravate and exaggerate his claim
"for pecuniary compensation."

The principle that a court of equity will always intervene to prevent a nuisance which goes to the substance of a freehold, is not universal in its application, and will always be modified to suit the particular facts and conditions before the court for determination.

This has been cautiously and justly set forth by the Supreme Court of California in the following language:

"Whether ditch properties in the mineral regions of
"this state, although conceded to be real estate, used as
"it is for purposes of trade and commerce, is to be re-
"garded by courts of equity with the same measure of
"favor which is bestowed by them upon land which is
"held and cherished by the owner for ITSELF, and not
"merely put to use for an ulterior object, admits at least
"of serious doubt. Such ditches are more or less tem-
"porary. They are not valuable *as land*. Their value
"depends entirely upon the demand for water, and when
"the demand has ceased they become worthless. The
"qualities upon which the common law grounds its pe-

"culiar fondness for land, and the reasons why courts "of equity will interfere to protect it, would therefore "seem to be measureably wanting. (See the case of "Humphries v. Brogden, 12 Queen's Bench, Ad. & Ellis, "739; and Gibson v. Puchta, 33 Cal. 316.)"

Clark v. Willett, 35 Cal. at p. 549.

VII.

The injunction was in effect a mandatory injunction. A court of equity rarely decrees a mandatory injunction requiring the performance of constructive in contradistinction to destructive work, and will never decree a mandatory injunction when the work commanded to be done requires in its execution such skill, judgment and technical ability as was required to close the intakes complained of.

The remedy by injunction is wholly preventive, prohibitory or protective. And this is true whether the form of injunction be prohibitive or mandatory. A court of equity will not interpose for the sole purpose of redressing a wrong. It has been said that the chancellors borrowed the writ from the old Roman "interdict".

The Supreme Court of Illinois, following the notion contained in the word "interdict" says:

"It comes between the complainant and the injury he "fears or seeks to avoid. If the injury be already done "the writ can have no operation for it cannot be applied "correctively so as to remove it."

Wangelin v. Goe, 50 Ill. 459, at p. 469.

The same court again says:

"Resort cannot be had to the writ of injunction, di-

"rectly or indirectly, to obtain affirmative relief, but its "office and use are to afford preventive relief as to "wrongs and injuries threatened and which the party "fears."

Baxter v. Board of Trade, 83 Ill. 146.

The result desired must always be the prevention of a wrong. Sometimes a mere prohibition will not serve to accomplish such desired result; and the fact that technical prohibition will not suffice to stand between the complainant and his injury forces a court of equity, in order to accomplish the desired end, to issue what is termed, a "mandatory injunction". The purpose, however, is always to prevent a wrong, and never to redress an injury.

The familiar case calling for the exercise of a mandatory injunction is the building of a dam, the effect of which is to flood or injure complainant's property. In such a case it was said by the court:

"It is not to correct a wrong of the past, in the sense "of redress for the injury already sustained, but to pre- "vent further injury. The injury consists in the over- "flow of the lands of the plaintiff. It was not alone the "building of the dam that caused the injury, but its "*maintenance or continuance*, which is a part of the act "complained of; and its maintenance can only be stopped "so as to prevent its injury by its removal. The removal "of the dam, wrongfully constructed, is necessary for "and incidentally involved in the preventive redress "which the law authorizes."

Troe v. Larson, 84 Ia., 649; 35 Am. St. Rep. 336; 51 N. W. 179.

Pomeroy commenting upon this decision says:

"On this ground the use of mandatory injunctions is "resorted to whenever necessary to give the full relief "to which the plaintiff is entitled. In such cases it is gen- "erally *destructive acts requiring no supervision* that are "required, as the removal of an object that is, or causes "a nuisance."

5 Pomeroy Eq. Jur., 1 Pomeroy Eq. Rem., Sec. 533, p. 913.

As observed by Pomeroy in the same section, it is true that occasionally constructive acts are required, but always in cases of continuing nuisances, and as has been heretofore argued, the injunctive relief is based upon a *meditated maintenance* of the wrongful act.

An examination of all of the authorities by Pomeroy in support of the principles laid down in such section, and a diligent examination of all the authorities upon the subject by counsel, has failed to disclose a single case in which a mandatory injunction was issued unless the party against whom it ran was by express or implied affirmative conduct maintaining the condition which superinduced the injury which the court sought to prevent.

There is a line of authorities in which mandatory injunctions have been issued to public service corporations, to compel the performance of statutory regulations or of duty to the public, in which the basis of the writ was akin to the basis of the writ of mandamus, which, however, have no application to conditions as presented upon this appeal; and in many of such cases the courts of equity have refused to intervene, and have

intimated that the proper remedy was the legal remedy of mandamus.

The distinction between ordering by mandatory injunction constructive work as contradistinguished from destructive work is clearly defined in the case of

Doran v. Carrol, 11 Irish Chancery, page 379.

The subject matter of that case was a wall which the defendant had destroyed. The complainant sought by mandatory injunction, to compel him to rebuild it. It would seem that these facts are very similar in principle to the facts in this case. The chancellor said:

"It (the destruction of the wall) has been accom-"plished and it is now entirely a matter for the consid-"eration of a court at law. The wall is prostrate and "there is an end of it. It is clearly not a case in which "a mandatory injunction to rebuild the wall could be "granted."

Perhaps the controlling reason why courts of equity are reluctant to order constructive work by mandatory injunction is, that a chancellor will not undertake to compel the doing of an affirmative act unless the work to be done is definitely described and easily ascertained and so capable of being readily performed as to render possible the execution of the decree by the marshal if the defendant refused, or from lack of money or any cause was unable to perform.

Back of this consideration is the fundamental principle that a court of equity will not decree the performance of a vain and idle act. It will at times compel the performance of some ordinary act, such as the construction of a switch, or the building of a bridge over a

ditch or stream, acts, whose performance under prevailing mechanical conditions is as simple as acts of destruction. But no court of equity would undertake to compel the construction, we will say, of a suspension bridge over the Hudson river, or a tunnel beneath it.

A temporary injunction was issued in May and the California Development Company was then under order to close these intakes.

Rockwood testified that he did all that engineering skill and prudence and abundant labor and material could do, to close the intake, and failed.

Duryea, on the other hand, testified that Rockwood's methods were incompetent, and that his (Duryea's) plan for closing the intake was the sound and skillful one. He did not divulge to Randolph nor to the court what his plan was. He said: "In a contract like that (closing the intake) the principal stock in trade is the method."

When the first efforts had proved a failure, Rockwood devised a new method. It was to construct a wooden gate of sufficient dimensions to carry the entire flow of the river at low water; to make the floor of the gate lower than the bottom of the intake; the entire river, seeking the lowest point, would flow through the gate and leave the intake dry; then the intake could be rapidly closed, the gate shut, and the waters would flow past the intake and find their way to the Gulf.

Edlinger, the engineer for the Southern Pacific thought that Rockwood's plan would fail. Schuyler thought that Rockwood's plan would succeed; Edlinger had his plan, which consisted of a diagonal dam from

a point above the intake to an island opposite it, which would divert the river through the channel on the other side of the island, away from the intake and thence to the Gulf.

Was Randolph in contempt when he adopted Rockwood's plan? Was it contempt to refuse to accept Duryea's proposition? Should the California Development Company in order to escape contumacy have ordered a board of examiners to ascertain whether Duryea, Rockwood or Schuyler or Edlinger or Randolph was the most skilled engineer? Was the defendant complying with the order when, with feverish haste, constructing Rockwood's gate, and was it in contempt when its officers stood upon the banks of the river and saw what was left of the Rockwood gate floating toward the Salton Sink?

Duryea appeared to criticize Rockwood and Edlinger for spending some of their nights at Yuma, and testified:

"I think there should have been very complete jurisdiction (supervision?) by all of the higher officials; they should have kept in constant touch with the work and should have been on the work a large part of the time. It was a serious question." [P. 330]

This testimony of Duryea's, of itself, suffices that the bill should be dismissed.

Courts of all jurisdictions have united in the doctrine *that courts of equity will decree the performance of no work which requires continuous supervision.*

Precisely the same principle guides a court of equity

in such cases as guides it in suits for specific performance.

"The injunction prayed for in this case would, if "granted, accomplish all that a decree for specific per- "formance could effect, and therefore all the principles "which apply to the case of a bill for specific performance "apply with equal force to the case of a bill for perpetual "injunction, when that injunction accomplishes all the "objects which could be accomplished by a successful "prosecution of a formal bill for specific execution."

Whalen v. B. & O. R. R., 69 Atl., p. 391, at p. 394.

"It is contended that the agreement is of such a char- "acter that a court of equity will not attempt to "decree its specific performance. * * * It is urged "that the contract is one in which the skill, expe- "rience and cultivated judgment of the parties must be "exercised in order to confer upon either of them the "substantial benefit of its performance. * * * When "the act to be performed depends upon the skill, expe- "rience, and cultivated judgment of the person who has "obligated himself for its performance, courts of equity "will not undertake to coerce a literal and perfunctory "performance which would be but a vain and idle act.

"It is one thing, however, to stop a party from doing "that which he cannot rightfully do, and another to un- "dertake to compel him to do an act involving the ex- "ercise of faculties and judgment which are peculiar and "personal to himself; and the argument from inconven- "ience which may properly be invoked when the court is "asked to decree a specific performance would, if it

"should be controlling when the court is asked to re-
"strain the doing of an unlawful act, apply to all cases
"in which the corrective power by injunction is exer-
"cised."

Chicago & A. Ry. Co. v. N. Y., L. E. & W. R. Co., 24 Fed., at p. 521.

"Another serious objection to a decree for specific per-
"formance is found in the peculiar character of the con-
"tract itself, and in the duties which it requires of the
"owners of the quarries * * * they involve skill, personal
"labor and cultivated judgment."

Marble Co. v. Ripley, 10 Wall., 339, at p. 358.

See to the same effect:

Bradfield v. Dewell, 48 Mich. 9; 11 N. W. 760;

Certainly the defendant's obligation by reason of the acts complained of could not have been stronger than if it had entered into a solemn contract to close the intakes.

Let us suppose that Randolph on behalf of the California Development Company had accepted Duryea's offer. It appears at page 368. He was to turn ninety per cent of the water back into the old bed of the river and to keep it there for ten days for $135,000, and the free use of all materials that were upon the ground or in transit, and the free use of the plant which was on the ground or in transit. He refused to disclose the nature of his plan.

Had such a contract been made, and Duryea failed, would it be argued that a suit for specific performance to compel him to perform his contract, could have been maintained? Certainly no authority can be adduced in

support of such contention, and if not, then how may a court of equity issue a mandatory injunction against the California Development Company?

VIII.

The court had no jurisdiction to decree an injunction in this suit in the absence of a determination at law that the acts of the defendant complained of constituted a nuisance.

Pomeroy suggests that a problem of procedure may be presented to the equity courts when an injunction is sought by a plaintiff in whose favor the fact that a nuisance exists has never been determined.

"In such case", he asks, "should the court of equity pass on the questions of law or fact raised? Or should it refuse its extraordinary relief until the plaintiff has procured a judgment of a court of law in his favor?

1 Pomeroy's Eq. Rem., Sec. 519.

After discussion of this problem at some length he concludes that the rule that the question on which the legal rights depend, should be first tried at law "still persists in most jurisdictions in which it has not been abrogated by statute."

Idem, Sec. 522.

It will be borne in mind that the acts of the California Development Company were not *per se* a nuisance. Intake No. 1 had been opened in December, 1902, and it had done no injury to anybody, either actually or theoretically. Intake No. 2 did no injury. Complainant admits that intake No. 3, under ordinary conditions, would have done no injury, and constituted no nuisance.

Defendant contends that Intake No. 3 never did work a nuisance; that there was no nuisance; that the property of complainant was inundated by reason of the acts of God.

It is an admitted fact that prior to the message sent by the President to Congress in January, 1907, Intake No. 3 had been entirely closed, and has remained closed ever since, by means of a dam of solid and impregnable rock; but that after all three intakes had been thus closed the floods swept over, not only the banks of the river, but the levees which had been constructed, and cut another intake through which the floods continued to pour into the canals of the defendant and upon the lands of the complainant. It was then a question of fact whether the defendant had committed any act which caused or even contributed to the injury of complainant's property. The flooding existed at the time of the commencement of the suit. Complainant claimed that it was a nuisance created by defendant. This the defendant denied.

It is the accepted law, that under such conditions, when what is claimed to be a nuisance already exists, and the claim that the act complained of constitutes a nuisance is controverted, a court of equity cannot act until such disputed claim is determined by a court of law.

"When the alleged nuisance is prospective and threat-
"ened, a court of equity may interfere to prevent its be-
"ing brought into existence. When what is claimed to
"be a nuisance already exists, the general rule is that
"the fact that it is a nuisance must be established by a

"suit at common law before a court of equity will in-
"terfere to abate. Varney v. Pope, 60 Me. 192. This
"has always been the doctrine in this state. (Cases
"cited.)

"It is true that this general rule is subject to excep-
"tions. In cases of pressing or imperious necessity, or
"where the right is in danger of being injured or de-
"stroyed, or there is no adequate remedy at law, equity
"will interfere."

Tracy v. LaBlanc, 36 Atl., p. 399, at p. 400.

"And a court will always act with reluctance in abat-
"ing a nuisance and seldom, if ever, until it is regularly
"found to be such by a jury."

Dunning v. City of Aurora, 40 Ill. 481, at p. 486.

"But where the thing is not itself noxious, but only
"something which may according to circumstances prove
"so, then the court will refuse to interfere until the mat-
"ter has been tried at law. * * *"

Kennedy v. Etiwan, 17 S. C. 411.

The idea contended for is suggested by the Supreme Court of the United States in the case of Northern Indiana Railroad Co. against Michigan Central Railroad Company, *supra,* in the following language:

"In the course of such an investigation it may be
"necessary to protect an issue to try the title of the par-
"ties or to assess the damage complained of in the bill."
(P. 244.)

To the same effect see:

Wangelin v. Goe, 50 Ill. 459;

Roath v. Driscoll, 20 Conn. 533, at p. 539;
Harrelson v. K. C. Co., 52 S. W. 368;
Erwin v. Dixion, 50 U. S. 10;
Wood v. McGrath, 24 Atl. 682;
Burnham v. Kempton, 44 N. H. 78, at pp. 95 and 97;
Brooks v. Norcross, 4 Fed. Cases, 294, No. 1957.

IX.

There is no allegation or proof that the defendant when able to control the waters of the Colorado river, at any time so used them as to permit waste water to flow upon the lands of the complainant. Therefore, inasmuch as the headgate had been constructed and the intakes closed prior to the trial and decree, whatever may have been the power of the court to retain jurisdiction for the purpose of awarding judgment for damages, it had no power to decree an injunction and thereby restrain the defendant from performing acts which it had never done or threatened to do.

The learned district judge sets forth in his conclusions the grounds for the injunction which was decreed, in the following language:

"If, when the suit was brought, there were grounds "for injunction, such grounds have not been removed by "the destruction of complainant's works and by the clos- "ing of defendant's intakes. Complainant is entitled to "have its freehold protected, without regard to the "amount of the damage threatened, otherwise the over- "flow sought to be abated might, by prescription, ripen "into a servitude upon the land. Furthermore, the pres- "ent safeguards against overflows may be but temporary,

"while the complainant's remedial rights, if it has any, "include permanent relief." (P. 129.)

The first sentence of the above quotation, is founded upon the assumption that the defendant had threatened or intended to construct further intakes of dangerous character. There being no allegation or proof upon which to base such assumption it follows that the closing of the intakes by the defendant before the decree did remove the grounds for the injunction if any existed at the time of the commencement of the suit.

The statement that "the present safeguards against overflows may be but temporary," has no foundation in the evidence. It was conclusively established that the intakes which caused the trouble were definitely closed.

Complainant's right to an injunction does not necessarily follow from its right "to have its freehold protected." Complainant's right to have its freehold protected was probably co-existent with its title to the same, but its right to an injunction against the defendant can only exist as a result of acts by defendant invading or threatening to invade such right.

The acts alleged are that defendant constructed intakes without making "provision for control or regulation of the amount of water diverted by it into said intakes." The complainant offered evidence tending to prove this allegation but offered no evidence whatever as to any other improper or unlawful act of defendant; and so far as we can see, counsel has made no other charge against defendant than such acts.

All of these intakes had prior to the decree, been closed and a new intake had been constructed and in its

construction, provision was made for the control and regulation of the water diverted by it.

The court, therefore, had no right to assume that the defendant having power to regulate and control the intakes for the water diverted by it, will wantonly, or otherwise, so control them as to suffer waste water to flood complainant's property.

If, as a matter of fact, since the construction of the present intakes, defendant has suffered or caused waste water to flow into the Salton sea, the complainant in order to protect its freehold, must bring a suit for an injunction based upon such acts by the defendant. Or if such acts were committed prior to the decree the complainant should have filed a supplemental bill stating such facts and have offered evidence to establish them. Upon the present record it was error for the court to find, without accusation, that the defendant meditated wrong-doing and to issue its injunction accordingly.

It seems unreasonable to assume that unpreventable flood water, flowing through the intakes on defendant's naked land, could ripen into an easement in favor of the defendant, when the allegation of the defendant in its answer and the evidence of all parties, were that the defendant had nothing actively to do with such unpreventable flooding.

X.

The Imperial water companies and the Mexican corporation were necessary parties to the suit.

In reenforcement of the authorities cited in appellant's opening brief, and in reply to the argument of appellee in opposition to the above proposition, we submit the following quotation from the case of the Northern Indiana Railway company against the Michigan Railroad company, *supra:*

"This question is, therefore, vitally interesting to the "New Albany company; and by the bill we are called to "decide that question, although that company is not "made a party to the suit. It is impossible to grant the "relief prayed, without deeply affecting the New Al- "bany company. If their charter should be held good, "as claimed by that company, an injunction against the "defendants would materially injure the New Albany "company. * * *

"The Act of 1839 provides, that 'where in any suit " 'at law or in equity commenced in any court of the " 'United States, there shall be several defendants, any " 'one or more of whom shall not be inhabitants of, or " 'found within the district, jurisdiction may be enter- " 'tained, but the judgment or decree shall not conclude " 'or preclude other parties. And the nonjoinder of par- " 'ties who are not inhabitants, or found within the dis- " 'trict, shall constitute no matter of abatement, or other " 'objection to said suit.'

"The provision of this Act is positive, and in ordi- "nary cases no difficulty could arise in giving effect to

"it; but in a case like the present, where a court cannot "but see that the interest of the New Albany company "must be vitally affected, if the relief prayed for by the "complainant be given, the court must refuse to exercise "jurisdiction in the case, or become the instrument of "injustice. In such an alternative we are bound to say, "that this case is not within the statute. On both the "grounds above stated we think that the circuit court "has no jurisdiction."

It was inconsistent with the theory of organization of the Imperial Water companies that their stock should be held permanently or for any length of time, by the California Development company and their policies or actions directed by it.

The farmers who were to become the ultimate owners of the stock of the Imperial Water companies depended for existence upon the ability of the defendant to furnish the water companies with water, by diverting the same from the Colorado river, and their interest, to borrow the language of the court above quoted, "must "be vitally affected if the relief prayed by the complain-"ant be given."

See also

State v. Goodnight, 11 S. W. 119.

An injunction commanding the California Development company to construct headgates upon Mexican soil was in effect a command to the Mexican corporation, which alone had the necessary authority from the Mexican government.

Where a foreign corporation representing the power of a foreign government for diversion of water of a

river on foreign soil by intakes built therein, is a necessary party to any suit requiring a modification of such intakes by other acts of construction on foreign soil and cannot be made a party by any service of process, the jurisdiction of equity is lost and the bill must be dismissed.

Ribon v. Railroad Companies, 16 Wall. 446;
Barney v. Baltimore, 6 Wall. 280;
Thayer v. Life Assurance Company, 112 U. S. 717;
Shields v. Barrow, 17 Howard 130.

XI.

The court erred in deciding that the jurisdiction of the Circuit Court, sitting as a court of equity to restrain the wrongful diversions of water, draws to it the cognizance of the damages, if any, which had resulted from such diversions.

This point has been elaborately discussed in appellant's opening brief and but little can be added to what has been there said.

The precise question seems to have been decided by the Supreme Court of Rhode Island in a case which does not appear to have been cited upon such brief and the attention of the court is here invited to it. It was a suit for an injunction to restrain the obstruction of a flow of water and the complainant asked for damages occasioned by the past obstruction. The court sustained a demurrer, saying:

"The complainant has his action on the case at com-"mon law for such injuries and the jury trial is the more

"appropriate proceeding for the recovery of damages. "There is no analogy between this case and the infringe- "ment of a patent where equity holds the user of anoth- "er's invention as a trustee, accountable for profits "earned. Here the damages are unliquidated and can- "not be made the subject of an accounting."

Miner v. Nichols, 52 Atlantic 893.

See also

Stevenson v. Morgan, 64 N. J. Eq. 219.

It would seem that the right of the complainant, in a suit for an injunction, to recover a money judgment by way of damages for acts done prior to the injunction rests upon the principle that a court of equity will not permit the defendant to profit by his own wrong; and the court will award the complainant as damages, the value of such benefits as may have accrued to defendant by reason of such wrongful acts. The theory is that the defendant having secured such benefits by such wrongful acts, holds them as a trustee *per fraudem* for the complainant. Where the damages are unliquidated, in other words *where the complainant has been damaged, but where the defendant has not profited by the wrongful acts,* the elements of such trusteeship do not exist and a court of equity does not draw to it the cognizance of such damages.

In conclusion, appellant submits that without regard to matters of technical procedure, it is obvious upon the whole record, that this was not a proper case for injunctive relief.

At the time this suit was brought and certainly long prior to the time when complainant by filing its bill in the Circuit Court, elected to proceed in equity, complainant must have realized that its property was, or surely would be destroyed and that it had in fact, if not in theory, a complete remedy at law. Why then, did complainant elect to prosecute its suit for damages in this indirect fashion? It must have appreciated that its property was lost beyond peradventure and that no number of injunctions could as a matter of fact, protect it from destruction. It cared nothing then and it cares nothing now for its barren freehold. It is of no consequence to it whether the evaporation of Salton sea be retarded six months or a year.

Why then did complainant deliberately and after defendant's demurrer interposed, insist upon the equity side of the court as its forum? Why did eminent counsel, with a clear field ahead for an action at law, "take chances"? It would seem that complainant must have been animated by some undisclosed purpose. It may be that it feared a jury trial and undertook by indirection to deprive defendant of its right to one.

Or still other reasons may exist.

At the earlier stages of this litigation, the financial condition of the defendant was necessarily precarious. It was confronted by a condition of facts almost without parallel.

As stated by the president in his message to congress:

"After the mischief became apparent, strenuous ef-

"forts were made by the California Development com-
"pany to close the intake, but these were without suc-
"cess." (P. 2091.)

"The people in their desperation were reported as
"having tried to sell bonds secured by their property, in
"order to give to the California Development company
"one million dollars to assist in repairing the break."
(Pp. 2092-3.)

"Again, the owners of the property in Imperial Val-
"ley, both farmers and townspeople, together with the
"Southern Pacific company and the California Develop-
"ment company have combined to call upon the govern-
"ment for a contribution to assist the California De-
"velopment company to the extent of erecting permanent
"works to insure protection for the future." (P. 2093.)

The defendant has been compelled to expend, and therefore to borrow, millions of dollars in order to save the people of this valley from ruin. The Southern Pacific company which stood in the breach and furnished the defendant the means wherewith to meet the situation and close the intake, has no recourse for the millions thus expended except those of a general creditor of the defendant, and has no hopes of being reimbursed in any of these enormous expenditures except through the operations of the defendant's plans of irrigation.

The injunction granted by the decree in this action, if construed according to the contention of appellee, will in effect, close the headgates at the Colorado river, and put a total end to irrigation, except by permission of complainant.

Such an injunction, as complainant must know, is of

no practical value to it. It has value only as a weapon whereby complainant can coerce the Southern Pacific company and the settlers in the valley, all innocent and fellow sufferers, to pay or settle this enormous judgment. If perchance, this is the motive which inspires the complainant so actively to seek equitable relief, its course is even more inequitable than the alleged criminal negligence of the luckless Rockwood.

No reason exists or has existed why defendant should be deprived of its constitutional right to a trial by jury.

The decree should be reversed and the bill dismissed.

Tucson, Arizona, October 1, 1908.

Respectfully submitted,

EUGENE S. IVES,

Of Counsel for Appellant.

No. 1584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE CALIFORNIA DEVELOPMENT COMPANY (a corporation),
Appellant,

vs.

THE NEW LIVERPOOL SALT COMPANY, (a corporation),
Appellee.

APPELLEE'S POINTS AND AUTHORITIES.

PAGE, MCCUTCHEN & KNIGHT,
Of Counsel for Appellee.

Filed this.....day of December, A. D. 1908.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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The first proposition discussed in "Closing Brief of Appellant" is "the Circuit Court for the Southern "District of California had no jurisdiction to decree "an injunction in effect abating a nuisance caused by "the construction of intakes in the Republic of "Mexico."

The allegations of the bill of complaint dealing with waste waters are:

> "That waste water in very large quantities is still running into said lake and increasing the size

thereof, and the danger that all of the property of the complainant will be covered by water and its property and business destroyed." (Par. IX, p. 66, This is admitted by the answer, p. 108.)

"That all of the flooding and overflowing of the lands of complainant as hereinbefore set forth is caused by, and is the result of the diversion by defendant from the Colorado River of the streams of water as hereinbefore set forth in excess of the amount required for any useful purpose whatever; and a continuance of such overflow and flood will result from the continued diversion by defendant of the waters of the Colorado River which naturally flow in another direction." (Par. XI, p. 67.)

"That defendant will, unless restrained by this court, continue to divert from the Colorado River large quantities of water which would naturally flow in another direction, so that the same will flood and overflow all of the lands of complainant, and thereby destroy the property and business of complainant, and occasion complainant great and irreparable injury. That plaintiff has no adequate remedy at law." (Par. XII, p. 67.)

This would seem to be amply sufficient, especially in conjunction with a prayer for general relief, to warrant the decree.

Appellant lays great stress upon the allegation of the bill that, unless the defendant be required to construct head works for controlling and regulating the amount of water flowing into its canal, the overflow complained of will continue, and (appellant) contends that this is really the injury of which we complain.

The injury charged in the bill of complaint resulted from the discharge of waste waters which flowed upon

complainant's land. It was of no concern to complainant how much water was diverted, as long as the quantity diverted was so used as that none of it should flow upon its land. The allegation upon which counsel lays so much stress might be omitted from the bill entirely, and there would still remain sufficient upon which to base the decree which was entered below. Indeed, it will be observed that the decree does not require defendant to construct any headgates, but enjoins it from discharging waste waters, and requires it to regulate the flow of the water which it does divert.

In

Allen v. Woodruff, 96 Ill. 11, 18,

the court said:

> "It often happens, as in the case before us, that in framing a bill in chancery the pleader, after having correctly stated the actual facts of the case, which is all the law requires, proceeds to make some additional allegations with respect to what the pleader supposes to be the legal effects of those facts, which may be entirely erroneous, yet the complainant in the case is not to be concluded or prejudiced by such unnecessary statement. His rights must depend upon the actual facts stated, and not upon the erroneous conclusions of the pleader with respect to them."

If the point now made by counsel had been urged in the court below, and it had been deemed to have any weight, it could have been cured by an amendment. While it is true there was a demurrer to the bill of complaint, neither upon the argument of the demurrer

nor upon the trial of the case was any suggestion of this kind made. There is no hint of anything of this nature in any assignment of error.

When the decree was entered the only headgate or intake which defendant had was the one at the head of its canal in the State of California. Before the entry of the decree the two intakes in Mexico had been permanently closed, but nevertheless waste water was being discharged into Salton Sea.

Furthermore, at the time of the commencement of the suit, and for a long time thereafter, the diversion through the California intake was very large, amounting on the date of the filing of the complaint to 1110 second feet, and increasing thereafter until, on the 21st of March, the diversion through that intake was 2590 second feet. These figures are from the report of the United States Geological Survey for the year 1905, page 23 (offered in evidence by defendant).

This evidence shows conclusively that Intake No. 1 was open during the month of March, and this is amply borne out by other testimony in the record. Rockwood said (page 1201) that he caused the two upper intakes to be closed in December, 1904, by means of sack-brush dams, but within two or three days there was a rise in the river which broke both of the dams. There is no hint of any dam having been constructed at Intake No. 1 after that time. He also said (page 1228) that those dams were simply put above the water sur-

face as it then existed with the intention of raising and strengthening them later; and further said (same page):

> "You must remember too that these dams were put in simply for the purpose of proving whether or not my theory was correct, that by stopping the water from coming in at the two upper intakes, it would increase the flow at the lower. Consequently, my only object was to prevent the flow of water *for the time being,* in order that I might prove my theory to be correct or false."

There is no claim that any dam was constructed at the head of Intake No. 1 after the temporary dam was washed out in December, 1904, and, indeed, if any such claim were made, it would be flatly contradicted by the record of measurements to which we have called attention.

The case of

Cushing v. Pires, 124 Cal. 663,

was one for an injunction to restrain the defendant from destroying a culvert constructed to carry off surface waters. Upon appeal it was claimed the complaint did not state a cause of action. The court said:

> "On an inspection of the record we cannot say that this argument is altogether without foundation. But we find that no such argument as this and no objection of this nature was at any time presented to the court in which the case was tried. There was no demurrer to the complaint, and no motion based upon a variance between the pleadings and proof, and to such evidence as might have been objected to on the ground that it was not pertinent to the case made by the pleadings no such objection was made. Had counsel made the ob-

jection he here urges and presented his argument in support thereof at the trial with the same force and clearness as in his brief in this court, it would have resulted, probably, in an amendment of the complaint. He did not do this, but proceeded with the trial as if all the matters to which the evidence was directed were properly in issue. The findings and judgment were clearly supported by the evidence, and the case was decided correctly on the merits.

* * * * * * * * *

"It is true that the objection that the complaint does not state a cause of action may be successfully made for the first time on appeal, but the appellate court will not be over zealous to find a defect in a complaint that the appellant himself failed to discover until the case had been decided against him on its merits. We think the defects in the complaint, as well as the variance complained of, are of a nature to be waived by failure to call them to the attention of the trial court by proper objections, and that defendant should not be heard to urge those objections for the first time after judgment."

In

Holman v. Boston L. & S. Co., 45 Pac. (Colo.) 519, 521,

it was said:

"But the issue upon the defective character of the machinery, as the cause of the fire, which was injected into the case by the evidence, was accepted by both sides, without question, as the main issue for trial. Their tacit agreement as to the questions involved controlled the course of the trial, and the proceedings subsequent to the trial. It was acted upon throughout by the trial judge, and the arguments of the respective counsel in this court

> are based upon the same theory of the case which they mutually adopted below. We are therefore compelled to disregard the pleadings, and decide the case as the parties have seen fit to present it to us."

The Supreme Court of the United States has forcibly expressed itself in the same connection. The case of

> *Wasatch M. Co. v. Crescent M. Co.,* 148 U. S. 292, 37 L. Ed. 454,

was one for the reformation of a deed. The appellant contended that the complaint stated a case for reformation for fraud, while the findings showed one for mistake, and that there was, therefore, a variance. It was also contended that the complaint did not set out the true contract as shown by the evidence. The court held that the objections came too late, saying:

> "The Supreme Court of the territory rightfully held that the defendant should have raised the question in the trial court, where ample power exists to correct and amend the pleadings, and, not having done so, but having gone to trial on the merits, the defendant was precluded from assigning error, for matters so waived.
>
> "The doctrine on this subject is well expressed in the case of *Tyng v. Commercial Warehouse Co.,* 58 N. Y. 313: 'No question appears to have been made during the trial in respect to the production of evidence founded on any notion of variance or insufficiency of allegation on the part of the plaintiff. Had any such objection been made it might have been obviated by amendment in some form or upon some terms under the ample powers of amendment conferred by the code of procedure. It would, therefore, be highly unjust, as well as un-

supported by authority, to shut out from consideration the case, as proved, by reason of defects in the statements of the complainant. Indeed, it is difficult to conceive of a case in which, after a trial and decision of the controversy, as appearing on the proofs, when no question has been made during the trial in respect to their relevancy under the pleadings, it would be the duty of a court, or within its rightful authority, to deprive the party of his recovery on the ground of incompleteness or imperfection of the pleadings.'

"No injustice is done the appellant by thus disposing of this objection, because the facts conclusively show that the written contract between the parties was not annulled or a new one substituted, but that it was substantially executed—the defendant simply accepting other conditions than those stipulated in its favor and delivering a deed as averred in the complaint."

To this first point several cases are cited by appellant, but the only one upon which we desire to comment is that of *Gilbert v. Moline Water Power & M. Co.,* 19 Iowa 319. That was an action to enjoin the maintenance of a dam on the Illinois side of the Mississippi River, the result of which was to flood the land of the plaintiff in Iowa. The court held that it had no jurisdiction to award the relief. The only case relied upon by the Iowa court is *Mississippi & Missouri R. R. Co. v. Ward,* 67 U. S. 485, the true doctrine of which we think the Iowa court misconceived and wrongly applied. The Iowa case differs radically from this, however, in that no part of the defendant's works were in the State of Iowa; whereas the greater portion of the canal system of the de-

fendant, and the portion from which defendant was actually discharging water on to complainant's lands, was in the State of California.

In all the cases upholding the right of action for injuries to land in one jurisdiction, resulting from acts in another jurisdiction, *Bulwer's case,* 7 Coke Rep. Ia. 77 Eng. Rep. 411, is cited. In that case B brought an action on the case in the County of N for maliciously causing him to be outlawed in London upon process sued out of a court at Westminster and causing him to be imprisoned in N upon a writ issued at Westminster. It was held that in all cases where the action is founded on two things done in several counties, and both are material or traversable, and one without the other does not maintain the action, the plaintiff may bring his action in which county he will. In the course of the opinion, the chancellor cites all the previous cases to the point and, among other things, says:

> "If a man doth not repair a wall in Essex, which he ought to repair, whereby my land in Middlesex is drowned, I may bring my action in Essex, for there is the default, as it is adjudged in 7 H. 4, 8; or I may bring in Middlesex, for there I have the damage, as it is proved by 11 R. 2. Action sur le Case 36."

High on Injunctions, 2nd Ed., section 803, says:

> "It is also to be observed that the remedy by injunction being primarily in personam, a nuisance consisting of an injury to water rights may be enjoined in the state which has jurisdiction of the person committing the injury regardless of the *locus* of the nuisance itself."

In

Foot v. Edwards, 9 Fed. Cases No. 4908,

the defendant diverted water in Connecticut from a stream which had its rise in Connecticut, and thence flowed into Massachusetts. The diversion by the defendant caused the flow to cease past plaintiff's mill which was situate upon the same stream in Massachusetts. The court reviews the authorities and comes to the conclusion that an action could be brought in either state, and summarizes the holding of Woodbury, Judge, in

Stillman v. White Rock Mfg. Co., Fed. Cases No. 13,446,

as follows:

> "If a mill situate in one state is injured by the diversion, in another state, of the stream upon which it is situate, and a suit for such diversion should be brought before the federal court in the state where the mill is situate, such suit would be properly brought, and such court would have jurisdiction of the case."

The court, however, in the latter case held that an action was properly brought in Rhode Island, the jurisdiction in which the diversion of water occurred and which injured the mills in Connecticut. It was contended by the defendants that the action should have been brought in the jurisdiction in which the injury occurred.

In

Great Falls Mfg. Co. v. Worster, 23 N. H.; 3 Foster 462,

the plaintiffs owned a dam extending across the boundary river into the State of Maine. The defendant was a citizen of New Hampshire. Defendant destroyed a part of the dam and threatened to remove the whole of it, the injury being in the State of Maine, resulting in injury to plaintiff in New Hampshire. The court reviews the earlier authorities with regard to extra territorial jurisdiction of equity and holds that it has jurisdiction in this case, saying:

> "It would be a great defect in the administration of the law, if the mere fact, that the property was out of the state could deprive the court of the power to act. As much injustice may be perpetrated in a given case, against the citizens of this state, by going out of the jurisdiction and committing a wrong, as by staying here and doing it. The injustice does not lose its quality by being committed elsewhere than in New Hampshire, and as the legislature has conferred upon the court the power to issue injunctions whenever it is necessary to prevent injustice, it is the duty of the court to exercise that power upon the presentation of a proper case, and when it can be done consistently with the acknowledged practice in courts of equity. As the principle which is sought to be applied here, has been recognized for nearly two hundred years, we have no hesitation in holding, that the court has jurisdiction to issue the injunction prayed for."

It was held in

Rundle v. Delaware & R. Canal, 21 Fed. Cases 12,139,

which was an action for diversion of water,—although the decision is not directly in point upon other grounds,—that although the earlier cases, which the court reviews, apply to counties, the same reasoning would apply to different states.

To the same point, Justice Holmes, in

Manville v. Worcester, 138 Mass. 89,

says:

> "As between two states, both of which recognize the right, if the rule is to vary at all, it should be on the side of a greater liberality to prevent a failure of justice such as would be likely to happen in the present case if this action were not maintained,"

which was an action for tort for diverting the waters of a natural stream in Massachusetts and preventing them from flowing past the plaintiff's mill in Rhode Island. Justice Holmes in this case also shows that there is no distinction between the diversion of flowing water to which land is entitled and the discharging of water upon land, saying:

> *"but we cannot assent to the distinction between discharging and withdrawing water. The consequence in one case is positive, in the other negative, but in each it is consequence of an act done outside the jurisdiction where the harm occurs and the consequence is as direct in the latter case as in the former."*

Both of these last mentioned rules are adverted to in

Willey v. Decker, 100 Am. St. 939, at page 970.

The case there was an action to restrain the defendants from diverting water in Montana of which there had been a prior appropriation in Montana by the plaintiff for use upon lands in Wyoming. The action was commenced in Wyoming. Objection was made to the jurisdiction upon the ground that the cause of the injury arose outside the state. The court reviews the cases on the subject and says, at page 971:

> "On principle and authority, therefore, we think there can be no doubt of the jurisdiction of the District Court to render a decree restraining the defendant Demmons from diverting the waters of the stream in Montana to such an extent as to deprive those plaintiffs whose lands are situated in this state to the water to which they are found to be entitled by priority of appropriation. As to them, the whole of the injury occurs in this state."

In the case of

Deseret Irr. Co. v. McIntyre, 16 Utah 398, 52 Pac. 628,

the plaintiff's dams and ditches, as well as its lands to be irrigated therefrom, were situated in Millard county, where the action was brought. The dams and ditches of the defendants were located in Sanpete county. The court observes that neither the facts relating to the diversion alone, nor those relating to the injury alone, are sufficient to constitute a cause of action; that some of the material facts arose in Sanpete county and some in Millard county, and the cause of action may be said to

have arisen in each county. And the court say: "There- "fore, the plaintiff's had the right to elect in which "they would bring their action".

The rule in California is the same. In

Lower Kings River W. D. Co. v. Kings R. & F. R. Co., 60 Cal. 408,

the plaintiff diverted water in Fresno county by means of a ditch for use in Tulare county. The defendant at the head of the ditch in Fresno county diverted some of the water belonging to the plaintiff. An action was brought for damages and an injunction against the further diversion in Tulare county. A motion for change of venue was made upon the ground that the action should have been brought in Fresno county, the place where the diversion occurred. The lower court denied the motion and an appeal from the order was taken. The court in affirming the order said:

> "The acts complained of are preventing water from flowing in plaintiff's ditch; the ditch is located in both counties; therefore the subject of the action is in both counties, and the action might have been brought in either. It is true that the specific act complained of, viz.: the diverting of the water, occurred in Fresno county, at the head of defendant's ditch, and not at all upon plaintiff's ditch; but the consequences of that act operated upon the whole of plaintiff's ditch, and was injurious as well to that part of it in Tulare county as to that in Fresno county. In no sense can the injury be said to be confined to that part of the ditch in Fresno county. The ditch is an entirety, and the right to have water flow in it is co-extensive with plaintiff's right to the ditch itself. Such is the case as now presented to us."

That case was affirmed in

Last Chance W. D. Co. v. Emigrant D. Co., 129 Cal. 277.

In this latter case the plaintiff was the proprietor of a water ditch situate partly in Fresno county and partly in Kings county, through and by means of which it takes and supplies to its stockholders water which it has appropriated from the Kings River. The diversion by the plaintiff occurred in Fresno county, as also did that of the defendants. An action was brought in Kings county to enjoin the defendant. A motion was made for change of venue upon the ground that the action should have been commenced in Fresno county, the place of the diversion. The motion was denied and the defendant appealed. The court in affirming the order, Justice Harrison writing the opinion, said:

> "The case falls directly within the principles declared in *Lower Kings, etc., Ditch Co. v. Kings River, etc., Canal Co.*, 60 Cal. 408, in which it was held that plaintiff's right to have water flow in the ditch is coextensive with its right to the ditch, and that, although the act of diverting the water was committed in Fresno county, it was an injury to that portion of its ditch which was in Tulare county, and that the action was properly brought in the latter county. In *Drinkhouse v. Spring Valley Water Works*, 80 Cal. 308, it was held that a suit for an injunction to restrain the defendant from building a dam which, when completed, would permanently flood the plaintiff's land was a suit for an injury to real property, and under section 392 of the Code of Civil Procedure the county in which was situated the property that would be injured was the proper place for its trial, even though the action did not seek for damages."

In

Anderson v. Bassman, 140 Fed. 14,

the plaintiffs were riparian owners of lands on a stream in California. The defendants were appropriators of the water for irrigation purposes from the same stream in Nevada. The appropriators of water in Nevada sought an injunction against the riparian owners in California to enjoin them from the use of the water in excess of their rightful quantity. The action was brought in the Circuit Court of California.

> "It is objected by the defendants that the relief sought by the bill, in determining the rights of the complainants to a specific quantity of the waters of the West Fork of the Carson River, is beyond the jurisdiction of this court, in that it is asking the court to pass upon titles to real property in another state. This question was considered by Judge Knowles in the United States Circuit Court for the District of Montana in the case of Howell v. Johnson, 89 Fed. 556, and later in the case of Morris v. Bean (C. C.), 123 Fed. 618. In each of those cases the complainant was a citizen of Wyoming, and the defendants citizens of Montana. The complainant owned land in Wyoming, and for the purpose of irrigating the same appropriated certain waters of a creek which had its source in Montana, flowed for some distance within its boundaries, and then entered the State of Wyoming. The complainant's point of diversion and ditch conveying the waters were within the State of Wyoming. Defendants settled along the banks of the creek in Montana, above the land of the complainant, and subsequently to the appropriation by complainant diverted the waters of said creek to their own lands, preventing its flow to the lands of the complainant. In the suit brought by complainant in the United States Circuit Court

> to *enjoin* the defendants from so diverting the waters of said creek the question of the jurisdiction of the federal court was raised by the defendants. The court held that one who has acquired a right to the water of a stream flowing through the public lands by prior appropriation, in accordance with the laws of the state, is protected in such right by sections 2339 and 2340 of the Revised Statutes (page 1437, U. S. Comp. St. 1901), as against subsequent appropriators, *though the latter withdraw the water within the limits of a different state.*"

The case of

Miller & Lux v. Rickey, 127 Fed. 573,

arose out of a suit for an injunction brought by the users of water in Nevada against citizens of California. The plaintiffs appropriated the water in California for use on their lands in Nevada. The defendants diverted the water belonging to the plaintiffs in California. The defendant interposed a plea to the jurisdiction of the court contending that the nuisance taking place in California the Circuit Court of California should have cognizance of the matter only. Judge Hawley, sitting in the Circuit Court for Nevada, after reviewing the authorities, held that the Nevada court had jurisdiction. The case was then appealed to the Circuit Court of Appeals for the Ninth Circuit, where Judge Wolverton delivered the opinion of the court, concurred in by Judges Gilbert and Ross. The court again reviews the authorities and affirms the decision of Judge Hawley, saying:

> "If such be the law where the *res* is without the jurisdiction of the court, by how much stronger

> will be its application where the jurisdiction extends over the *res* as well as the person. So that the court having jurisdiction of the *res*—that is, of the thing in controversy, which is the realty in the present instance—has undoubted authority and jurisdiction, having also jurisdiction of the person to protect the thing against the encroachments of the person, whether those encroachments come from within the state or without." (152 Fed. 11, 17.)

The second point made by counsel is "the Circuit " Court had no jurisdiction to compel the defendant to " construct headgates in the Republic of Mexico; for " the reason that the defendant would not have been " permitted by the laws of the Republic of Mexico to " construct such headgates" (Brief, p. 24).

Counsel loses sight of the double aspect of the case. But, taking his view as to the facts, is his conclusion of law therefrom justified?

Counsel cites in support of his contention *Texas & Pac. R. R. Co. v. Gay,* 25 L. R. A. 52 (Brief, p. 25), which case, only goes to the point that a court of equity cannot put a receiver in control of land outside the jurisdiction.

He also cites *Port Royal R. R. Co. v. Hammond,* 58 Ga. 523 (Brief, p. 27), which case holds that specific performance of a contract to be performed outside the jurisdiction and which involves supervision by the court will not be decreed.

Such a case arose in Indian Territory, involving the sale of oil wells, the contract for which also provided that the wells were to be worked. The Court of Appeals of Indian Territory held:

> "We are of the opinion that a court of equity in the Indian Territory should not undertake to operate an oil lease in the territory of Oklahoma, where the agreement is wholly *indefinite* as to the manner of working and the extent of the operations to be carried on."

This is believed to be the extent to which like opinions go, and that where the thing to be done and the manner of performance are definite equity will interfere. This is

Wilhite v. Skelton, 82 S. W. 932.

The case was, however, appealed to the United States Circuit Court of Appeals for the Eighth Circuit, 149 Fed. 67. It was there contended that the judgment of the lower court should be sustained upon the same ground—that a court of equity will not decree specific performance where the contract requires constructive work and supervision by the court. Judge Sanborn, however, said:

> "(3) Because the court was without power to operate the mine on the leasehold property which was in the territory of Oklahoma and beyond its jurisdiction, and because, if it had held the power, such operation would have been impracticable. But the court had jurisdiction of the persons of the defendants, and thereby had plenary power to compel them to act in relation to the leasehold without its jurisdiction which they owned and to which their contract related."

It will be granted, no doubt, that the maintenance of water upon the land would ultimately create a servitude. Appellant's contention is, in effect, that it could not construct controlling gates at the Mexican intakes without the consent of the government of Mexico—that it could not act until the Mexican Government acted. This would seem the equivalent of saying that the Republic of Mexico by its inaction could authorize the defendant company to create and maintain a servitude upon lands within the jurisdiction of the Circuit Court of the United States.

To this point, it was said by Justice Holmes in

Manville Co. v. City of Worcester, 138 Mass. 89, that

> "Of course, the laws of Rhode Island cannot subject Massachusetts land to a servitude, and, apart from any constitutional considerations, if there are any, which we do not mean to intimate, Massachusetts might prohibit the creation of such servitudes. * * * So far as their creation is concerned the law of Massachusetts governs, whether the mode of creation be by deed or prescription, or whether the right be one which is regarded as naturally arising out of the relation between the two estates; being created, the law of Rhode Island, by permission of that of Massachusetts, lays hold of them and attaches them in such way as it sees fit to land there, Massachusetts being secured against anything contrary to its views of policy by the common traditions of the two states and by the power over its own territory which it holds in reserve."

A complete answer to this second point, however, is that it was not necessary that defendant should con-

struct headgates in order to prevent the diversion of water through the Mexican intakes. The fact is that it did not construct a headgate at either of those intakes. It constructed permanent dams there. In other words, it placed there the sort of obstruction which Rockwood testified he instructed his men to build in March, April and May, 1905. There is no showing that the consent of the Republic of Mexico was necessary in order to place these dams, nor is there any showing that its consent to the building of dams was ever obtained or asked.

The seventh objection of counsel is:

> "The injunction was in effect a mandatory injunction. A court of equity rarely decrees a mandatory injunction requiring the performance of constructive in contradistinction to destructive work, and will never decree a mandatory injunction when the work commanded to be done requires in its execution such skill, judgment and technical ability as was required to close the intakes complained of." (Brief, p. 50.)

To support this, counsel quotes at page 51 of his brief:

> "It is not to correct a wrong of the past, in the sense of redress for the injury already sustained, but to prevent further injury. The injury consists in the overflow of the lands of the plaintiff. It was not alone the building of the dam that caused the injury, but its *maintenance or continuance,* which is a part of the act complained of; and its maintenance can only be stopped so as to prevent its injury by its removal. The removal of the

dam, wrongfully constructed, is necessary for and incidentally involved in the preventive redress which the law authorizes."

Troe v. Larson, 35 Am. St. 336; 84 Iowa 649.

The remainder of the quotation is:

"The removal of the dam, wrongfully constructed, is necessary for and incidentally involved in the preventive redress which the law authorizes, and no technical application of a rule as to a mere method of procedure should be allowed to defeat so plain a rule of justice.

"It is said that the cases in which mandatory injunctions have issued are those of continuing trespasses or nuisances in which the defendant owned the land on which the nuisance was kept, or was active in continuing a trespass or nuisance on the land of the complainant; and it is sought to distinguish this case, because these defendants have not, since the building of the dam, *done any act or asserted any right to maintain the dam.* The dam came into being, and continues to be, because of their act of construction. The injury or trespass results from the wrongful act of construction, and the act continues or is coexistent with the trespass. While the dam continues as the result of their act of construction, they may be said in legal contemplation to be every day maintaining it. We are cited to no authority announcing a contrary rule, and it certainly accords with reason."

That was an action to compel the defendants to remove a dam erected by them across the mouth of Silver Lake, whereby the lands of plaintiffs adjacent thereto were overflowed. The decree of the district court restrained the defendants from maintaining the dam, and ordered that they should remove the same within sixty days.

The appellants contended that the court should not have so ordered because "it was a past and completed act " and not ground for preventive or mandatory injunc- " tion". The judgment of the lower court granting the injunction was sustained.

In

Gardner v. Stroever, 89 Cal. 26,

the Supreme Court of California holds to the same effect. There the defendant erected a building in the public road cutting off access to the slaughter house of the plaintiff.

> "It is further urged that the injunction ought not to have been granted, because it appeared that the obstruction sought to be enjoined actually existed at and before the time of filing the complaint (citing *Gardner v. Stroever,* 81 Cal. 148).
>
> "This position cannot, in our opinion, be sustained. An obstruction to the free use of property, so as to interfere with its comfortable enjoyment, is a nuisance, and the statute says it may be enjoined or abated. Such an obstruction must necessarily have an actual existence before it can be a nuisance. The judgment here might have been in direct terms that the obstruction be removed and the nuisance abated; but the mandatory injunction granted was evidently intended to have, and did have, the same effect. It was therefore an authorized and appropriate remedy."

It was early contended that after the wrong was committed, equity would not command the defendant to do anything but would simply command him to refrain and a decree was framed by Lord Chancellor Eldon to obviate the difficulty.

See

Lane v. Newdigate, 10 Ves. Jr. 192, 32 Eng. Rep. 818.

There

"The bill prayed, that the defendant may be decreed so to use and manage the waters of the canals as not to injure the plaintiff in the occupation of his manufactory; and, in particular, that he may be restrained from using the locks, and thereby drawing off the waters, which would otherwise run to and supply the manufactory; and that he may be decreed to restore the cut for carrying the waste waters from the *Arbury* Canal to *Kenilworth* Pool, and to restore *Kenilworth* Stopgate, and the banks of the canal to their former height; and also to repair such stopgates, bridges, canals, and towing-paths, as were made previously to granting the lease; and that he may be decreed to make compensation for the injury sustained by their having been suffered to go out of repair; and that he may be decreed to remove the locks, which have been made since the lease, and to make compensation for the injury sustained by the said locks having been made so near the manufactory; thereby injuring the machinery; and, that he may be decreed to pay the plaintiff the expense he has been put up to by working the steam engine, to supply the want of water.

"The *Lord Chancellor*, upon the motion for the injunction, expressed a difficulty, whether it is according to the practice of the court to decree or order repairs to be done. (See 1 *Ves. Jun.* 235.)

"*Nov. 2d, 13th, Mr. Romilly,* in support of the injunction, said, the repairs to be done in this case are in effect nothing more than was done in *Robinson v. Lord Byron (1 Bro. C. C.* 588): viz., raising the dam-heads, so that the water shall not escape; as it will otherwise.

> "The *Lord Chancellor* (Eldon). So, as to restoring the stopgate, the same difficulty occurs. The question is, whether the court can specifically order that to be restored. I think I can direct it in terms, that will have that effect. The injunction, I shall order, will create the necessity of restoring the stopgate; and attention will be had to the manner in which he is to use these locks; and he will find it difficult, I apprehend, to avoid completely repairing these works."

The chancellor then proceeded to frame a decree sufficient to meet the necessities of the case.

In

> *Goodrich v. Georgia R. & B. Co.*, 41 S. E. 659 (Ga.),

the plaintiff owned land through which ran two streams. These were dammed by defendant for the purpose of creating a water supply for its railroad. The defendant was diverting the water from a reservoir thus formed by means of ditches. It was

> "contended that the order granting the injunction, when applied to the facts of the present case, would have no other effect than to compel the defendant to perform an act, and that the writ of injunction cannot be used for this purpose under the law of this state."

The code of the state provided:

> "An injunction can only restrain; it cannot compel a party to perform an act. It may restrain until performance."

The court held, however:

> "If the main purpose of the petition is to compel the performance of an act, then, under our Code, injunction cannot be used as a remedy to accomplish this purpose. Under our Code injunction can be used only to restrain. It does not necessarily follow, however, because injunction can be used only for this purpose, that it cannot be used when the effect of yielding obedience thereto would incidentally require the performance of some act, if the main purpose of the injunction is to restrain the doing of some wrongful act. It seems to us that the true meaning of the section above quoted is that the court cannot issue a purely mandatory order, but that the court can grant an injunction, the essential nature of which is to restrain, although in yielding obedience to the restraint the defendant may be incidentally required to perform some act."

Judge Sawyer, held to the same effect in

> *Cole Silver Mining Co. v. Virginia & Gold Hill Water Co.,* 1 Sawyer 470; 6 Fed. Case No. 2989.

Plaintiff, in excavating a tunnel in a mountain to its mining claim, struck a subterranean flow of water, which it appropriated. Defendants ran a tunnel into the mountain directly below that of plaintiff and thus intercepted plaintiff's flow of water. Judge Sawyer said:

> "It is shown, and this does not seem to be seriously controverted, that the water can be restored by building a water-tight wall or bulkhead across the tunnel at a point indicated. But it is urged, that the injury has been committed, and that, this being so, the court will not, on motion for a preliminary injunction, issue a mandatory writ, affirm-

atively commanding the performance of an act such as to fill up a tunnel, rebuild a wall that has been demolished, and the like; and so the authorities seem to be.

"But, while this seems to be an established rule, it, also, appears to be well established that the result sought may be accomplished by an order merely restrictive in form. For example, if the water of a stream be raised by means of a dam, so as to wrongfully flood a party's land above, or obstruct with back-water, a mill situated higher up the stream, while the court will not direct the defendant in terms to remove the dam, it will require him to refrain from overflowing the land, or obstructing the mill, even though it be necessary to demolish the dam in order to obey the injunction. So if a party, by means of a dam, or canal, should wrongfully divert the water of a stream from the mill of his neighbor, clearly entitled to it, *the court would restrain the continuance of the diversion, even though an obedience to the injunction should render it necessary to remove the dam*, or fill up the canal. 2 Eden, Inj., by Waterman, 388; 3 Daniell, Ch. Pr. 1767, and notes, last edition. Robinson v. Lord Byron, 1 Brown, Ch. 588; Lane v. Newdigate, 10 Ves. 192; Rankin v. Huskisson, 4 Sim. (6 Eng. Ch.) 13; Earl of Mexborough v. Bower, 7 Beav. (29 Eng. Ch.) 127; Murdock's Case, 2 Bland, 470, 471; Washington University v. Green, 1 Md. Ch. 502-504; North of England C. & H. J. R. Co. v. Clarence R. Co., 1 Colly. (28 Eng. Ch.) 521; Spencer v. London B. R. Co., 8 Sim. (8 Eng. Ch.) 193.

"Under these authorities, by whatever name judges may see fit to call the injunction, the defendants may be restrained from continuing to cut off and divert the water in question, *even though it should be necessary for them to fill up, or build a water-tight barrier across the tunnel to accomplish the end sought.*"

The eighth objection is:

> "The court had no jurisdiction to decree an injunction in this suit in the absence of a determination at law that the acts of the defendant complained of constituted a nuisance."

To this extracts from *Pomeroy's Equity Remedies* are cited. In section 521 of that work it is shown that, when plaintiff's title is clear or is proven and when the facts of the nuisance are undisputed or the proof shows there is a nuisance, there need be no prior determination at law. Section 522 discusses the point where there is some doubt either as to the title or the fact of the nuisance. That section reads:

> "The class of cases not yet discussed is that in which on application for a permanent injunction, the plaintiff's right, or the fact that a nuisance exists, is doubtful on the evidence before the court, and the parties do not consent to have the controversy settled by the court of equity. In this situation the general doctrine is that 'either party is entitled to insist that the questions on which the legal rights depend should be tried at law.' Satisfactory grounds to support this rule as a matter of reason are not to be found in the cases. Doubtless the explanation of it is largely the fact that in early days the courts of equity were reluctant to undertake the decision of purely legal rights, or questions of fact which ordinarily were tried by a jury. It was 'a rule of expediency and policy, rather than an essential condition and basis of the equitable jurisdiction.' As such, the grounds on which it arose have largely, if not quite, disappeared with the decay of all hostility of the courts of law against the equity courts and the general merging of both law and equity functions in the same courts. The rule, however, still persists in

most jurisdictions in which it has not been abrogated by statute. It has never gone so far, however, as to require the plaintiff's bill to be dismissed because the legal questions had not been determined; the court may retain the bill and procure their ascertainment by directing an issue, or an action, or a case stated, at law; basing its final decree upon the results thus reached. In leaving the subject it should be noted that when the bill is to enjoin a threatened, as distinguished from an existing, nuisance, from the nature of the case the requirement of a previous trial at law cannot be applied. 'No such question in this case can be tried at law, no nuisance exists—the object of the bill is to enjoin the defendant from creating one.' From the foregoing discussion it would appear that the following is an accurate summary of the general rules of equity with respect to the requirement of a previous establishment of the plaintiff's right at law. The requirement does not apply at all to applications for temporary injunctions; nor to bills for permanent injunctions on account of irreparable injury, when the defendant admits the plaintiff's right, or when the right is clear in favor of one of the parties, though disputed, or when both parties consent to a trial of the merits by the equity court; nor to bills for permanent injunctions against threatened, as distinguished from existing, nuisances; it does apply to all other bills for permanent injunctions, but there is a tendency to do away with the requirement by statute or judicial innovation."

In the *note,* Pomeroy says:

"In England, the rule is abolished by statute. The reform procedure has accomplished the same result in New York as California. Lux v. Haggin, 69 Cal. 255, 284."

In

Lux v. Haggin, 69 Cal. 284,

it is said:

> "Under our codes the riparian proprietor is not required to establish his right at law by recovering a judgment in damages before applying for an injunction. The decisions (in cases of alleged nuisances) based on the failure of the complainant to have had his right established at law have no appositeness here. Here the plaintiff must indeed clearly make out his right in equity, and show that money damages will not give him adequate compensation. If he fail to do this, relief in equity will be denied. But if he proves his case, relief will be granted, although he has not demanded damages at law. In the case at bar the plaintiffs do not admit that damages would constitute compensation, and ask for an injunction until they shall recover such compensation in an action for damages. The decisions which bear on that class of cases, and which require of the plaintiff to show that he has promptly sought redress at law, have little applicability."

The rule laid down by the *American and English Encyclopedia of Law,* Vol. 1, page 66, is:

> "Formerly this power was exercised only after the right of the plaintiff and the fact of the nuisance had been first established in a court of law. But at present, where the plaintiff's right is clear and the existence of a nuisance is manifest, a court of equity will interfere to give relief, and it is only when the plaintiff's right, or the question of nuisance, is doubtful that a previous settlement at law is necessary."

EQUITY WILL PROTECT THE FREEHOLD AND THE RIGHTS OF PROPERTY THEREIN, EVEN THOUGH THE BUILDINGS AND THE SALT DEPOSIT ARE, BY REASON OF APPELLANT'S ACTS, DESTROYED.

It is perhaps unfortunate that the freehold and right to beneficial enjoyment of its property still exist in the appellee sufficient to sustain an injunction against a continuance of the tortious acts of appellant, and thereby cause annoyance as stated in counsel's brief (page 101), but such is the fact and the law.

It is true that the land is at present covered by water, that the buildings and machinery are destroyed or removed. But the fact is that when, by reason of the natural forces of seepage and evaporation, provided the injunction obtained is effective and those forces are unhampered by acts of appellant, the water is removed, the land will again be of value to appellee. It can be readily ascertained, simply by reading the bill of complaint, that the object of the suit was to restrain the continued flow of water upon the land, and facts were adduced to show that, if such were the case, the water would dispose of itself and leave a valuable property. It is said the damages allowed covered the value of the land. There is no foundation for this assertion. We recovered judgment for damages for the destruction of improvements which were located on part of our land and for destruction of salt deposit on another portion. We neither asked nor were we awarded anything for damage to the freehold.

No matter how small the damage or what the resultant injury may be, the owner of land is entitled to have his freehold protected from the acts of another which amount to nuisance, trespass or waste.

The action of appellant, against the continuance of which the injunction is directed, has not been merely to interfere with the enjoyment of the property by appellee, but it has resulted in absolutely depriving appellee of the freehold. In other words, such action, if continued, will operate to entirely deprive appellee of the property *and to prevent its use for any purpose whatsoever.*

It was not until Lord Thurlow's time that trespasses of the nature here complained of were enjoined in equity to any extent, but Lord Eldon in *Hanson v. Gardiner,* 7 Ves. 306, 32 Eng. Rep. Reprint 125, and *Thomas v. Oakley,* 18 Ves. 183, 34 Eng. Rep. Reprint 287, crystalized the law. In this latter case the distinction between waste and mere trespass, as recognized by Lords Thurlow and Hardwick, and which counsel for appellant attempts again to revive, was done away with and injunctions were granted both for waste and trespass. This distinction was again referred to by Chancellor Kent in *Jerome v. Ross,* 7 Johns Ch. 315, 11 Am. Dec. 484, and *Livingston v. Livingston,* 6 Johns Ch. 497, 10 Am. Dec. 353. In these cases it was attempted to limit the relief to those cases of an aggravated or extraordinary nature in which the acts were essentially destruc-

tive. The authorities now uniformly follow the doctrine of *Thomas v. Oakley.*

Such is the law in California. In

Learned v. Castle, 78 Cal. 461,

which was also a case of *overflowing* of land in which an injunction was asked, McFarland, J., speaking for the court, said:

> "But the amount of damage estimated in money, *was immaterial.* That finding was only to damage done in 1878, when there was water on the land from other sources. The findings show that the waters diverted by the canal flow upon plaintiff's land, which would not 'flow' there if allowed to take their natural course; and that the embankments erected by defendants 'cause' such artificial flowing. And to thus wrongfully cause water to flow upon another's land which would not flow there naturally is to create a nuisance per se. It is an injury to the *right* and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude. (Richards v. Dower, 64 Cal. 64, and cases there cited; Tooth v. Clifton, 22 Ohio St. 247; 10 Am. Rep. 732; Casebeer v. Mowry, 55 Pa. St. 419; 93 Am. Dec. 766; Wood on Nuisances, 2nd Ed., p. 639). *The right to an injunction, therefore, in such case does not depend upon the extent of the damage measured by a money standard;* the maxim de minimus, etc., does not apply. The main object of the action is to declare a nuisance, and to prevent the continuance by mandatory injunction."

The mere fact of the trespass makes the "injury " irreparable in its nature".

Vestal v. Young, 147 Cal. 715;
Richards v. Dower, 64 Cal. 64;
Moore v. Massini, 32 Cal. 590.

The double aspect of the case is not to be lost sight of. By what has been said, it is not meant to imply that the damage has not been substantial. On the contrary, the once valuable land is now, *in its present condition,* absolutely worthless and will so continue until the appellant is compelled, by virtue of an injunction, to desist from pouring water upon the property. And, on the other hand, it does not follow that it always will be worthless. Indeed, the court must assume the land has value. *It should not be forgotten that we neither asked nor were we awarded any compensation for injury to our land.* The *potential* value of the land is still present, the value which will spring into being the moment the water is allowed, by natural process, to disappear. The case is thus infinitely stronger and appeals more powerfully to a court of equity than any mere case of waste or trespass. Here we have an absolute deprivation of a potentially valuable property, a deprivation absolute in its nature and yet not a destruction in any sense of the term,—a deprivation which, if reasonable precautions, as provided by the injunction, were taken, would soon end, and by no further act of appellant than simply ceasing to do wrong.

Against this it is argued that, because the property is destroyed, which it is not, no injunction may be had. And to make the inconsistency more confounding it is contended that no damages may be had for injuries received because asked for in connection with an injunction.

Upon the argument, counsel for appellant referred very vehemently to a statement on page 95 of the brief of appellee to the effect that on the 26th of March the property of complainant was practically destroyed. It is perfectly apparent from a reference to the testimony upon which the statement was based (and which is found at length on pages 94 and 95 of the brief) that the thought intended to be conveyed was that some of the property of complainant was practically destroyed by the 26th of March. It would be absurd to say that it appeared from the testimony referred to that *all* the property of complainant was practically destroyed by that date.

It is rather a peculiar contention that, because the salt deposit on a portion of the land and the improvements on another portion were destroyed, the land itself is entirely destroyed. It could not be contended that, because a crop of grain is entirely destroyed, damages for the full value thereof would act as a condemnation of the land.

Further, there is no evidence that the land, even that containing the salt, will not be of value. The presumption is it will. Other land in the same district is,—

else why should appellant construct a costly irrigation system? There is only counsel's surmise that the land owes all value to the salt crust. Why could not some grain or vegetable be produced? There is no evidence to show it could not, and the presumption would be rather that it could, for it may be ventured that there is no species of soil upon which something of commercial value cannot be grown. At least, it would seem, in the absence of any evidence to the contrary, complainant should have the benefit of an opportunity.

In this same connection counsel invokes the doctrine of comparative injuries. Contending, first, that as the property of appellee has been entirely destroyed, equity will not interfere when the damage ensuing to third persons from the granting of an injunction is greater in proportion than the relief to complainant; second, that, in any event, the injury resulting to the settlers in Imperial Valley from the injunction would justify its refusal if complainant were otherwise entitled to it.

Counsel for appellant rather slights the law in this regard. No distinction is drawn between interlocutory and permanent injunctions, and only two cases are cited. The law is too plain for argument and the necessity of citation, to show that in cases of preliminary injunction the court may exercise a very sound discretion in granting or withholding them where the balance of convenience is such that the complainant could only be slightly benefited, while the defendant might suffer substantial injury. But, on the contrary, in cases of

perpetual injunction, where the right of the complainant is established, the court has a very slight discretion, and none at all where the act of defendant results in depriving complainant of its freehold. The chancellor does not act as of grace in such case.

> "But that grace sometimes becomes a matter of right to the suitor in his court, and, when it is clear that the law cannot give protection and relief—to which the complainant in equity is admittedly entitled—the chancellor can no more withhold his grace than the law can deny protection and relief, if able to give them. This is too often overlooked when it is said that in equity a decree is of grace, and not of right, as a judgment at law. * * * Certainly no chancellor in any English speaking country will at this day admit that he dispenses favors or refuses rightful demands, or deny that, when a suitor has brought his cause clearly within the rules of equity jurisprudence, the relief he asks is demandable *ex debito justitiae,* and needs not to be implored *ex gratia.* And as to the principle invoked, that a chancellor will refuse to enjoin when greater injury will result from granting than from refusing an injunction, it is enough to observe that it has no application where the act complained of is in itself, as well as in its incidents, tortious. * * * There can be no balancing of conveniences when such balancing involves the preservation of an established right, though possessed by a peasant only to a cottage as his home, and which will be extinguished if relief is not granted against one who would destroy it in artificially using his own land."

Sullivan v. Jones & Laughlin Steel Co., 66 L. R. A. (Pa.) 712;

Also

Corning v. Troy Iron and Nail Factory, 40 N. Y. Rep. 191, 205.

It is sometimes held that where, if an injunction be issued, it will cause irreparable damage to the public generally, the court may refuse to grant it, especially in the case of a preliminary injunction. This is not in contradiction to the principle laid down *supra* that complainant is entitled to have his freehold protected, without regard to what his damage may be, but it rests in a sound discretion of the trial court. The case of *McCarthy v. Bunker Hill & Sutherland Mining & Coal Co.,* 147 Fed. 191, cited by counsel in support of his contention is not at all in line with the present case.

The damage in that case was comparatively slight and only deprived the complainant of an *incidental* enjoyment of his property.

Respectfully submitted,

PAGE, MCCUTCHEN & KNIGHT,

Of Counsel for Appellee.

No. 1584.

IN THE

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The California Development Company, (a corporation),
Appellant,
vs.
The New Liverpool Salt Company, (a corporation),
Appellee.

PETITION FOR REHEARING.

EUGENE S. IVES,
Counsel for Appellant.

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.....*Clerk.*

By..... *Deputy Clerk.*

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PETITION FOR REHEARING.

The appellant respectfully petitions for a rehearing, and offers the following argument in support of its petition:

We will not ask the court to review its conclusions that the destruction of the property of appellee was caused by the negligence of appellant, that there was no failure of parties defendant, and, that the court, if it at any time had equitable jurisdiction, had power to retain jurisdiction and award damages.

We will, however, ask that further consideration be given to the following proposition deemed by us to be sound in law.

UNDER THE ALLEGATION IN THE COMPLAINT THAT "UNLESS THE DEFENDANT BE REQUIRED TO CONSTRUCT HEAD GATES FOR THE CONTROLLING AND REGULATING OF AMOUNT OF WATER FLOWING INTO ITS CANALS THE SAID WATER WILL CONTINUE TO FLOW AND DESTROY AND RUIN THE PROPERTY AND BUSINESS OF COMPLAINANT" AND THE EVIDENCE THAT SUCH DESTRUCTION OF COMPLAINANT'S PROPERTY COULD ONLY HAVE BEEN PREVENTED BY CLOSING THE INTAKES IN MEXICO THE COURT HAD NO JURISDICTION TO GRANT EQUITABLE RELIEF.

Our reasons for asking the court to review its decision upon the issues involved in this proposition are:

First. While a court may restrain a defendant over whose person it has jurisdiction from doing an act in a foreign jurisdiction, it can never by mandatory injunction compel him to do a positive act in a foreign jurisdiction.

Second. While a court of equity, having jurisdiction over the person of a defendant, may adjudicate as to the respective rights of the complainant and defendant to water appurtenant to complainant's lands within the jurisdiction of the court, and may restrain the defendant from asserting rights to such water inconsistent with the rights of the complainant, it cannot by mandatory decree compel the defendant to do any positive act of either construction or destruction upon property beyond the jurisdiction of the court, even if such act be

essential to complainant's enjoyment of his right to the water so adjudicated.

Third. A court of equity is without power to compel a defendant to do anything which is not capable of being physically done within the territorial jurisdiction of the court.

Fourth. Without respect to the question of extra territorial jurisdiction, the facts in this case were not such as to call for equitable relief.

At the time of the commencement of the action, the properties of the complainant were almost if not totally destroyed by the consequential results of defendant's negligence.

The defendant at such time was not asserting any right to repeat the wrongful act which caused the damage, was not threatening to repeat it and was endeavoring to close the intake and in fact to do all which the complainant by injunction sought to compel it to do.

This is the undisputed proof.

Therefore there was no necessity or ground for the intervention of a court of equity.

STATEMENT.

In the very important case of Miller & Lux v. Rickey, 127 Federal, page 573, Judge Hawley, apprehensive lest the purport of his decision be misconceived and guarding against any possible misunderstanding or misapplication of the principle underlying it, at the very threshold of his opinion stated:

"In the disposition of the question it will be the aim of the court to confine itself to the real points directly

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involved by the particular facts of this case as drawn from the pleadings, and to the grounds upon which the decision will be based. It will, of course, be conceded at the outset that this court has no jurisdiction over lands and real estate situate without this district. *It cannot abate nuisances outside of the district.* It cannot reach property in *rem* wholly situate in other states. It cannot, by any decree which it may make in this suit directly reach the dams, reservoirs or ditches belonging to the defendant located entirely within the state of California. What is the nature and character of this suit, as shown by the bill of complaint and plea of the defendant?"

Let us therefore give careful consideration to the nature and character of this suit as shown by the bill and the evidence, assuming the facts to be in all respects as alleged and claimed by complainant.

The defendant claimed no rights in any way inconsistent with complainant's undisturbed enjoyment and possession of its property. The complainant did not claim and does not claim that the proper diversion of the waters of the Colorado river by the defendant and the irrigation of the lands in Imperial Valley were unlawful acts or in any respect tended to injure complainant or its properties.

Complainant's charge is that the defendant unnecessarily, and in order to save expense, cut intakes into the banks of the Colorado river in such negligent fashion that the property of complainant was *endangered*—not injured but endangered. It is not claimed that the necessary effect of the cutting of such intakes

was injury to complainant's property, as is the case where the construction of a dam is found necessarily to cause the flooding of another's property. (In such case the construction of the dam is a nuisance *per se* as was held in Leonard v. Castle, 78 Cal. p. 454, cited in the opinion.) The intakes were carelessly cut and with the expectation and reasonable expectation that before harm could result from them they could and would be closed. They were 60 feet wide and it is not claimed that a 60 foot wide cut would convey sufficient water to damage complainant's property. Huge floods of the Colorado river swept through this intake and enlarged it.

It is not suggested that the defendant either intended or desired this enlargement. While responsible for it as having been caused by the negligent way in which the 60 foot intake was cut, such enlargement as a matter of fact occurred in spite of the purpose and effort of defendant to check it and to close the intake.

At the time of the commencement of suit, the property of complainant was inundated and the total destruction of its buildings and machinery was either actually consummated or inevitable.

The defendant had in the meantime been making active efforts to close the break, which efforts at the very time of the commencement of the suit were being continued and renewed.

Supplement the above synopsis of the facts with the additional ones that the break to be closed was in Mexico and that its closing involved engineering plans and work of great skill, a vast expenditure and a doubtful result

and we have the facts substantially as they existed when complainant sought the intervention of a court of equity.

Of this condition of facts, this court, in its opinion, said:

"This was a continuing nuisance and trespass existing at the time of the commencement of the action, and without respect to the lands or the freehold estate continuing down to the entry of the decree for which an injunction was the only plain, adequate and complete remedy."

This conclusion of the court was essential to the affirmance of the judgment, and with it, we respectfully take issue. The acts complained of are in no sense a trespass.

Hicks v. Drew, 117 Cal. 305.

The defendant was neither expressly nor impliedly, doing any act tending to maintain or continue this nuisance. The act had been committed, the injury naturally followed from such act and was continuing despite the will and the effort of defendant to abate it. While the nuisance was continuing it is not true that the defendant was continuing it. The defendant had learned its lesson. There was no allegation or proof tending to show that the defendant having learned its lesson would ever undertake to repeat the offense. It had carelessly and negligently taken its chances that extraordinary floods would not come down the river. It had taken these chances safely on several occasions before. This, of course, did not relieve it from the consequences of its negligence, but it is not even suggested that defendant

was threatening or intending to take any further chances or to perform any other negligent act. It was doing its best to repair the results of its past negligence. It was meditating no wrong. When able to regulate and control the waters flowing through its headgates and canals, it had never so regulated them as to permit any overflow upon the lands of the complainant. It is not so alleged or claimed. The negligence of the defendant consisted entirely of one certain negligent act, from which all of the injury followed. For the consequences of such act it was responsible, of course, in an action at law for damages, but at the time of the commencement of this suit, neither its conduct nor its intentions or expressions of intention were such as to warrant an appeal by the complainant to the chancellor to force an unconscientious defendant to do equity.

Before examining into the law and by way of prefatory illustration, suppose that some careless person to serve a purpose of his own, had removed part of a river embankment or levee. The water working naturally, finds its way through and enlarges such hole in the embankment, and eventually destroys it and inundates complainant's property. The person tries in vain to arrest the progress of destruction which his negligence had brought about. Of course such person is responsible in damages; but will it be, can it be seriously argued that such facts will justify the intervention of a court of equity? That a court of equity will compel him to rebuild the embankment or as in our case

to sally forth into a neighboring republic and under the penalty of contempt, there undertake a colossal work such as the evidence shows to have been the closing of this break in the Colorado river?

If one had carelessly failed to extinguish the fire which he had built to cook his breakfast in North Dakota and an ensuing conflagration raging in such state had assumed such dimensions that it threatened to cross the line and consume properties in South Dakota, will it be contended that a court of equity at the instance of a resident in South Dakota whose property was thus threatened, assuming that the progress of the fire could be arrested by energy and skill and large expenditure, would, if the party who had started the fire could be served with summons within its jurisdiction, compel him by mandatory injunction to return to North Dakota and undertake the arrest of the flames?

With these preliminary suggestions let us now consider the legal issues involved in the proposition above stated upon which this petition is based.

ARGUMENT.

It will be conceded for the purposes of this petition that an action for damages to property within the jurisdiction of a court occasioned by a nuisance maintained in another jurisdiction may be brought at the election of the plaintiff in either jurisdiction.

We respectfully submit, however, that no authority has been found unless it be perhaps the case of Miller and Lux v. Rickey, which confers upon plaintiff such an election in a court of equity, where he seeks not

damages, but by injunctive process to abate the nuisance, and that the sound rule is that a court of equity is without power to compel a defendant to do anything which is not capable of being physically done within the territorial jurisdiction of the court.

In combating this principle, this court in its opinion asks:

"Why may not a court restrain a party over whom it has jurisdiction from injuring property within its jurisdiction? How does it affect the question of jurisdiction or venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court? May this not often happen and would it not happen oftener if it were determined that such an excuse was sufficient to defeat the jurisdiction of the court?"

These three questions may be answered separately.

The first. "Why may not a court restrain a party over whom it has jurisdiction from injurying property within its jurisdiction," might be answered in the affirmative, provided always that the restraining decree is a prohibition and is not an order requiring the defendant to do some positive act upon property beyond the jurisdiction.

The second may be answered by the following language in the opinion of the Supreme Court in the Northern Indiana R. R. case:

"Wherever the jurisdiction of the person will enable the Circuit Court to give effect to its judgment or decree, jurisdiction may be exercised. But wherever the subject

matter in controversy is local and lies beyond the limit of the district, no jurisdiction attaches to the Circuit Court sitting within it."

The "subject matter in controversy" here is not the lands of complainant in California. There is no contention or issue with respect to them. The matter in controversy was the intakes, whether the defendant should be compelled to close them, whether they were negligently cut and whether they were the proximate cause of the inundation.

The answer to the third inquiry is that where the litigation involves rights of the plaintiff to property within the jurisdiction of the court, which rights the defendant invades by his acts in another jurisdiction, the court will assume jurisdiction to adjudicate the rights of the plaintiff as to his property situated within the jurisdiction of the court, as was the case in Miller & Lux v. Rickey; but it will not undertake to go further and by injunction compel the defendant to perform any act upon the soil in another jurisdiction, even though the performance of such act be essential to the plaintiff's enjoyment of his property.

To repeat such inquiry, "How does it affect the question of jurisdiction of venue to say that the party on whom the court must act may find it necessary to do things outside the jurisdiction of the court in order to comply with the order of the court."

The further answer is that the court is without power. The defendant in order to obey must be permitted to escape; the court cannot hold him and compel obedience. When he escapes he may decline to obey and the court

will be without redress or power to compel his further obedience.

The principle is thus stated in the case of Munson v. Tryon, 6 Phila. 395:

"Jurisdiction is entertained in equity over extra territorial torts when the court has full power to execute its decree where the appropriate decree operates on the future conduct of the defendant and not directly upon the property threatened to be injured. When a nuisance has been set up and abatement decreed, in order to carry the decree into effect, a writ of assistance or other similar process may be necessary. Such a writ cannot be sent into a foreign jurisdiction, and therefore, in such a case, because a court of equity cannot complete its work, it will not commence."

The limitations, therefore, of a court of equity having jurisdiction over the person are fundamental, and it will not, because it cannot enforce an act which is incapable of being physically performed within its territorial jurisdiction.

In its opinion in this case the court cites many authorities to the effect that an action for damages may be brought in the district where the property damaged is situated, even though the nuisance causing the damage is maintained in another jurisdiction. But, saving always the case of Miller and Lux v. Rickey to which particular reference will presently be made, it cites no case where a court of equity assumed jurisdiction in derogation of the principle as thus laid down.

The cases of Massie v. Watts and Phelps v. McDonald, as well as the Lord Baltimore case cited in the opin-

ion do not appear to us to militate against this principle. They were all cases affecting, it is true, property in another jurisdiction, but where the act decreed to be done, to-wit: the execution of a conveyance, could be done within the jurisdiction of the court.

If a court of equity in California has jurisdiction over the person of a party who has real estate in the city of London which it is his duty to convey to the party in California, the court will compel defendant to execute such conveyance, even though the effect of such decree is to settle title to property in London.

The reason why the court assumes such jurisdiction is that as a matter of fact it has the power to compel the defendant to execute the conveyance. The act of conveyance is capable of being physically done within the territorial jurisdiction of the court and a court of equity will punish and imprison the defendant until he executes the conveyance in such form and manner as to effect a valid transfer of the property in London. Such decree would not of itself, operate as a conveyance in London. A deed in pursuance of it, or in other words, the active obedience of the defendant to the decree, is essential to its efficacy. If the law of England were that no conveyances of property in London would be valid unless the grantor in person stood upon the property and made the grant, and the fact that such was the law should be established to the satisfaction of the California court, then the California court would not make any such futile decree.

Texas & Pac. R. R. Co. v. Gay, 25 L. R. A. at top page 50.

Miller & Lux v. Rickey.

The fundamental distinction between this important case and our case is that the subject matter of the controversy between Miller & Lux and Rickey was the ownership of certain waters in the Walker river; while in the case at bar no question of conflicting rights is involved. The appellant has at no time claimed the right to divert water, if the effect of so doing would work injury to the land of the complainant. Its defense upon the merits was not that it had the right to divert the water, but that as a matter of fact the conceded negligent act of diversion was in the first place not its act, but the act of a Mexican corporation, and in the second place was not the proximate cause of the injury to complainant.

In the one case the action is in effect an action to quiet title, while in our case it is an action to abate a nuisance.

This was a suit brought to enjoin defendants from the alleged wrongful diversion of waters flowing down the stream of both forks of the Walker river, having their source in California and flowing down into and through the state of Nevada where the lands of the complainant were situated.

After alleging its rights and privileges in the premises and the alleged wrongful acts of the defendants, the complainant averred "That all of the said acts, doings and claims of the said defendants are contrary to equity and good conscience."

The prayer was that the "defendants be forever enjoined and restrained from diverting any water from

the said river above the points where the said complainant so diverts the same in such a manner or to such an extent as to deprive complainant of any of the waters aforesaid."

The plea of the defendant was that the only waters of the Walker river which he had diverted was under a claim of right to divert by reason of his ownership of certain lands within the state of California.

The defendants' alleged acts of diversion were in the state of California, and the suit was brought in the Circuit Court for the district of Nevada.

It appears, therefore, that the plaintiff in such suit claiming to own water appurtenant to land in Nevada, sought to quiet his title to such land and water by a decree of the court having jurisdiction in Nevada.

The defendant Rickey claimed title to the water as appurtenant to his lands in California, and in pursuance of such claim constructed a dam in California and diverted the water.

Judge Hawley rendered judgment over ruling defendant's demurrer to the jurisdiction of the court, 127 Federal.

The defendant, Rickey, thereupon answered, and the issues so joined have not as yet been tried.

In the meantime Rickey organized a corporation, the Rickey Land & Cattle Company, and conveyed to that corporation the water rights and the lands in California to which they were appurtenant, the ownership to which he had set up as a defense in his answer to the suit brought by Miller & Lux in Nevada.

Thereafter the Rickey Land & Cattle Company com-

menced two certain suits in the Superior Court of Mono county, Calif., wherein it alleged its ownership of such lands in California and its right to certain waters of the Walker river, and that the defendants in that suit, including Miller & Lux, the complainant in the Nevada suit were claiming the right to divert the water of the river, and alleged that the defendant, Miller and Lux, had no such right.

The prayer of the complaint in that case was that the title of the Rickey Land & Cattle Company to the waters of the river should be quieted as against Miller & Lux and the other defendants.

Miller & Lux thereafter contended in the Nevada suit that the issues in the Mono county suits brought by the Rickey Land & Cattle Company were the same as the issues in such Nevada suit originally brought by Miller & Lux, and asked for an injunction restraining the Rickey Land & Cattle Company from prosecuting such suits brought in Mono county.

After a hearing the injunction asked for was granted by Judge Hawley, 146 Federal. From the order granting the same the Rickey Land & Cattle Company appealed to the Circuit Court of Appeals which court affirmed the said order, 152 Federal. Thereafter the petition of the Rickey Land & Cattle Company to the United States Supreme Court for a writ of *certiorari* was made and granted, and the appeal is now pending in such court, and as we are advised, will be reached for argument in the month of November.

It will be observed that at no time has it been held that the Nevada court had power to grant an injunction

restraining defendant from diverting waters in California. The decision of Judge Hawley both in overruling the demurrer and in restraining the prosecution of the suits brought in Mono county were in effect that the Nevada court had jurisdiction to quiet title to complainant's land and water in Nevada, albeit that the effect of such decision was to adjudicate that defendant had no right to the same waters appurtenant to his lands in California.

It is possible that it might be inferred from the language employed by Judge Hawley quoted in the opinion of this court that the Nevada court having power to quiet title to complainant's land in Nevada, would also have power to prohibit the defendant from doing any act in Nevada or elsewhere, which would be an invasion of complainant's title thus quieted. The decision, however, overruling the demurrer does not necessarily carry any such import, for the demurrer was properly overruled if the complainant was entitled merely to have his title quieted.

In his opinion ordering the injunction he says at page 583:

"Under the facts of this case the question arises whether or not this court has power and authority to issue the injunction against the Rickey Land & Cattle Co. that is prayed for (meaning the injunction to restrain the California suits); in other words, has this court any jurisdiction in the premises?"

And later at page 588:

"The suits in this court will quiet and settle the title

or rights of the respective parties to the flowing waters of the Walker river."

Certainly the decision of Judge Hawley cannot be construed to mean that the Nevada court had the power to compel the defendant to do any positive act beyond the territorial limits of Nevada.

As has been suggested before, there is an obvious distinction in this matter of jurisdiction between the power to issue a restraining order and to decree a mandatory injunction requiring the defendant to do some positive act beyond the jurisdiction of the court. Judge Hawley says, 127 Federal, at p. 576.

"The direct purpose of all judicial acts is relief to a litigant which cannot be given by judgment or decree alone, but must be given if at all through the enforcement of the one or the other by appropriate process, and it has often been said that the highest test of the juris diction of a court in a given case is found in the answer to an inquiry whether it has lawful power thus to enforce its decree."

And as has been heretofore pointed out at the very outset of his opinion he wrote:

"It will, of course, be conceded at the outset that this court has no jurisdiction over lands and real estate situated without this district. *It cannot abate nuisances outside of the district.* It cannot reach property *in rem* wholly situated in other states. It cannot by any decree which it may make in this suit directly reach the dams, reservoirs or ditches belonging to the defendant located entirely within the state of California."

These two excerpts from Judge Hawley's opinion indicate that while he may have come to the conclusion that a court of equity had the power to issue a restraining order against any person over whom it had jurisdiction, it had no power to compel such person to do any act, the physical performance of which was incapable of being done within the jurisdiction of the court.

This Honorable Court in its opinion reported in the 152nd Federal, bases its affirmance and the jurisdiction of the court entirely as has been said upon its conclu sion that the action was in effect one to quiet title to property in the state of Nevada.

Even as Judge Hawley at the commencement of his opinion asked: "What is the nature and character of this suit?" so did this court at the outset of its opinion declare: "It is important that we first ascertain the nature of the subject matter of the cause."

It next elaborately discusses the nature of property in water, and concludes, "Could there be a plainer case of an attempt to quiet title to the appropriation itself? * * * It (the water) is appurtenant to the realty in connection with which the use is applied. It savors of and is a part of the realty itself. The suit, therefore, in its purpose and effect, is one to quiet title to realty."

It reviews all of the authorities to the effect that where the action was for damages, it might be brought either in the jurisdiction where the nuisance was maintained or where the lands which were injured were situated, and concludes with what we deemed a positive declaration of the principle as contended for by us:

"In the case of nuisance, however, where it is sought

to abate the nuisance by injunctive process, it is requisite that the suit be instituted in the jurisdiction where the nuisance is maintained, because it is said the remedy is *quasi in rem,* and must act upon the thing itself which is causing the damage. This was held in the case of Stillman v. White Rock Manufacturing Co., Fed. Cas. No. 13,446 (23 Fed. Cas. 83)." 152 Federal at p. 16.

This principle would seem, also, to be the same as that announced by the Supreme Court of Iowa, in the case of Gilbert v. Moline Water, Power & M. Co., 19 Iowa 319.

In its opinion in this case, this court does not refer to its own opinion in the Rickey case, nor to the above quoted portions of Judge Hawley's opinions, but says:

"Judge Hawley in an elaborate opinion considered the question of jurisdiction as presented by these objections and reviewed the authorities upon the subject, meeting and answering the objections raised and urged by the defendants in this case that the court could not send its process to execute its decree into foreign territory. The court says on page 580:

" 'That this court has jurisdiction over the person of the defendant is unquestioned. It can reach him by injunction, and punish him for contempt if he violates it. This doctrine had its foundation in the equity courts of England and at an early day.' "

Immediately preceding the part of Judge Hawley's opinion thus quoted, Judge Hawley wrote:

"The jurisdiction of courts of equity over the classes of cases affecting property without its local jurisdiction exists only when the relief sought is such that it may be

given by the acts of the person over whom the court exercises jurisdiction."

Our conclusion would be that if the court had any jurisdiction in the case of Miller & Lux v. Rickey, its powers were limited to granting a decree quieting the title of complainant to the waters appurtenant to its lands in Nevada; that the court would have no power to issue an injunction restraining defendant from maintaining a dam in California, *and certainly would have no power to issue a decree compelling him to pull down a dam in California;* that the court had no power to abate a nuisance maintained in California, but did have the power to determine the respective claims of the parties to ownership of the water—to decide whether the same was rightfully appurtenant to the lands in Nevada even though an adjudication to such effect would as a corollary establish that it was not rightfully appurtenant to the lands in California.

It was the conflicting claims to property in the water which gave the court jurisdiction, and its jurisdiction to render any decree whatever was dependent entirely upon the defendant's assertion of a right to the water which was inconsistent with plaintiff's alleged title to it.

The cases of Deseret Irr. Co. v. McIntyre, 16 Utah 398, and Willey v. Decker (Wyo.), 73 Pacific 210, cited by Judge Hawley, both involved conflicting claims to the ownership of water, and the court based its assumption of jurisdiction upon the fact that such suits were in effect suits to quiet title to realty within the court's jurisdiction.

If the defendant had interposed an answer admitting

the fact of the diversion, and denying that he made such diversion under claim of title, and disclaiming any right to the water, the court would have been without jurisdiction to enter a decree against him, even though it found as a fact that defendant was tortiously diverting water to which complainant was entitled. The defendant, Rickey, however, did allege ownership. Accordingly the court assumed jurisdiction to quiet plaintiff's title, but not to issue an injunction which would be effective upon the lands in California.

If after a decree quieting plaintiff's title, defendant should persist in diverting the water in California, the remedy of the complainant would be to go to California and apply for an injunction to the court having jurisdiction over the place of diversion. In such suit the decree of the Nevada court quieting complainant's title, would be a bar against any assertion by defendant of any right to divert the water, and, therefore, upon proof of the fact of the diversion, either a prohibitory or a mandatory injunction as a matter of course would issue from the California court.

Assuming despite the forceful argument of counsel for Rickey that the Nevada court in that case had jurisdiction to quiet the title of Miller & Lux as against Rickey, we believe that the character of jurisdiction and the nature of the decree, while in effect the same as an injunction restraining Rickey from diverting waters in California, would, in form, be necessarily analogous to a decree in an action to compel a conveyance of property in another jurisdiction. In other words, the court in Nevada would decree that Miller & Lux were entitled

to the water, and in order to give complete efficacy to its decree could instruct Rickey to execute to Miller & Lux a conveyance or quit claim to the water whose ownership Rickey was asserting in California. This conveyance Miller & Lux could use in California and thus acquire the entire benefit of the decree of the Nevada court. We urge, however, that in order to gain such entire benefit of the decree of the Nevada court, it is essential that Miller & Lux should have something further than the mere decree of the Nevada court. They must go into California either with the decree as the basis for the issuance of an injunction by the California courts, or with a conveyance of Rickey's right; for the decree of the Nevada court cannot be made to extend to the *res* in California.

In its last analysis a court of equity can only act upon the person and within its own limits compel such person to comply with its order, and unless such compliance within the jurisdiction of the court can give the complainant the remedy he seeks the court of equity is necessarily powerless.

Conclusion.

If the United States Supreme Court should reverse the judgment in the Rickey case, it is believed that such reversal would necessarily involve the enunciation of a principle of law which would be inconsistent with the legality of the decree in this case.

The reluctance of the United States Supreme Court to grant a petition of certiorari is well known. It would seem therefore that the denial of this petition by this

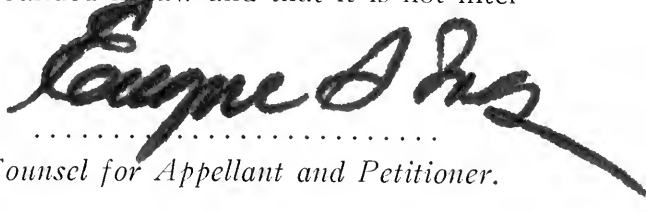
court would work a manifest injustice to this appellant if perchance the United States Supreme Court in its opinion in the Rickey case should establish the principle as now contended for by appellant.

It is furthermore believed that the perpetual injunction now affirmed may in the course of the vast irrigation enterprise conducted by the appellant give rise even to international questions with respect to the diversion of the waters of the Colorado river in Mexico. Appellant, therefore, most respectfully urges that this Honorable Court either grant the petition for a rehearing and let the further argument await the enlightenment which the decision of the United States Supreme Court in the Rickey case must necessarily give, or else grant this petition and thereupon certify to the United States Supreme Court the question of the power of the Circuit Court by mandatory injunction to compel the closing of a break of the Colorado river in the Republic of Mexico, and the further question of the jurisdiction of a court of equity to decree a mandatory injunction under the facts disclosed by the record in this case.

Respectfully submitted,

EUGENE S. IVES,
Counsel for Appellant.

I hereby certify that in my opinion the foregoing petition is well founded in law and that it is not interposed for delay.



Counsel for Appellant and Petitioner.

No. 1584.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The California Development Company, (a corporation),
Appellant,

vs.

The New Liverpool Salt Company,
Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF.

EUGENE S. IVES,
Of Counsel for Appellant.

Parker & Stone Co., Law Printers, 238 New High St., Los Angeles, Cal.

No. 1584.

United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

The California Development Company, (a corporation),
Appellant,

vs.

The New Liverpool Salt Company,
Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF.

Inasmuch as counsel for appellee in submitting his case, did not confine himself to filing a list of authorities as suggested upon the argument, appellant craves the indulgence of the court to file these few pages of reply.

I.

Counsel for appellee answering the contention of appellant that the allegations in the bill are interpreted and controlled by paragraph XII thereof, says:

"Appellant lays great stress upon the allegation of the bill that unless the defendant be required to construct headgates for controlling and regulating the amount of water flowing into its canal, the overflow complained of will continue. * * * The allegation upon which counsel lays so much stress might be omitted from the bill entirely, and there would still remain sufficient upon which to base the decree which was entered below. * * * [Pp. 2 and 3.]

Counsel apparently misapprehends the purport of appellant's point.

Appellant's position is, that the allegations in such paragraph, affirmatively preclude complainant from obtaining any relief from a court of equity.

The situation according to appellant is this:

Complainant comes to the chancellor and alleges that the defendant has done various acts, as a result whereof, the property of complainant is threatened with destruction, and then says:

" 'Unless it (defendant) be required to construct head gates for the controlling and regulating of the amount of water flowing into its said canal, the said water will continue to flow * * * and destroy and ruin' my property and business."

In other words, complainant after stating to the chancellor its grievances and its apprehensions, adds:

"Unless you require defendant to do certain things, you can be of no benefit to me."

The court of equity will investigate the acts complained of, and if under the limitations of its jurisdiction,

it has no authority to direct what complainant says must be directed in order to afford it the relief prayed, it must perforce reply to complainant:

"We find ourselves without power to do the acts which you declare to be essential to the saving of your property from destruction. We therefore can do nothing for you, and you must seek relief from another source."

Counsel claims that this point raised by appellant, was not raised in the lower court and was not assigned as error.

Present counsel has no knowledge of what was said upon the argument before the district judge, but certainly it cannot be assumed upon the record that such point was not made in argument.

The suggestion of counsel that had the point been raised, complainant could have met it by amendment, does not relieve the situation. The difficulty of complainant consists not in the form of pleading but in the existence of a fact alleged and sworn to by complainant and unquestionably true, which fact puts it beyond the power of a court of equity to give it the relief sought. Had complainant amended by withdrawing the allegation of this most material fact, defendant could have set it up as a defense to the jurisdiction of the court.

II.

Counsel says, at page 4:

"At the time of the commencement of the suit, and for a long time thereafter, the diversion through the California intake was very large, amounting on the date of

the filing of the complaint, to 1110 second feet, and increasing thereafter until, on the 21st of March, the diversion through that intake was 2590 second feet. These figures are from the report of the United States Geological Survey for the year 1905, page 23 (offered in evidence by defendant)."

The same point was suggested by counsel upon the argument. At that time counsel for appellee produced a volume (not, according to our recollection, one of the volumes of the official record), from which he read certain figures, indicating that on the 21st of March, the flow not through intake No. 1, but through the canal supplied by the headgate, around which intake No. 1 was cut, was some 2500 second feet, and counsel alluded at the time to the fact that the present counsel for appellant, not having taken part in the trial, had probably overlooked this important piece of evidence.

Counsel for appellee does not cite the number of the exhibit or the page of the record at which the report of the United States Geological Survey for the year 1905 may be found. A cursory examination of the record has failed to disclose to us any such report. But if the report should be a part of the record, and our recollection of it as stated upon the argument should be correct, it in no way tends to prove that intake No. 1 was open on the 21st of March, 1905. The government measurements according to such report, as we recall it, was taken about one mile below the headgate, and Intake No. 1; it did not indicate that any of the waters so measured flowed through the headgate, or the by-pass around it

designated Intake No. 1. The evidence shows that on the 20th of March, the river was at the extreme height of 30.3, and it appears in other portions of the record that at such height the waters of the river overflow its banks and find their way into the canals without regard to headgates or intakes. This overflow accounts fully for the volume of water in the canal so measured.

It will be remembered that intake No. 1 is a by-pass, cut around the original headgate constructed by the appellant. It is not claimed that this headgate was negligently constructed. The negligence charged at this point of diversion is confined to the opening of the unprotected by-pass and not to the construction of the headgate, which has withstood all floods and is still standing. The evidence quoted at page 9 of appellant's brief filed October 3 shows that this by-pass was closed prior to the March flood. Moreover, the fact that a mile below this head gate 2500 feet of water were flowing through the canal, does not tend to prove that this by-pass or intake No. 1 was still open, for, it is possible that the headgate itself had been opened, and in fact it is probable that appellant would have opened it in order to divert such water as could pass through such headgate, with a view to relieve the strain upon Intake No. 3, from which the serious danger was apprehended.

III.

Furthermore it is of but little consequence whether intake No. 1 was or was not open at the time the suit was commenced. The allegation in paragraph XII is that, unless the head gates (plural) be constructed, complainant's property must be destroyed. The closing of intake

No. 1 by the court would not have afforded complainant any relief unless intakes Nos. 2 and 3 were also closed.

Therefore a decree of the court directing the closing of intake No. 1, even assuming that it was open at the time of the commencement of the suit, would have been futile, and consequently the complainant would not have been entitled to such decree.

This principle is conclusively established in the case of Ward v. Mississippi &c. Co,. 2 Black 485, where the Supreme Court held that the Circuit Court erred in compelling the railroad company to pull down a portion of the piers of the bridge, because the pulling down of such portion would not give complainant the relief sought.

IV.

Most of the cases cited by counsel for appellee raise questions of venue and not of jurisdiction.

Miller & Lux v. Rickey Land & Cattle Co. sustains appellant's position, that the court has no jurisdiction. District Judge Hawley says in his opinion reported in 127 Federal, at page 575:

"It will, of course, be conceded at the outset that this court has no jurisdiction over lands and real estate situated without this district. *It cannot abate nuisances outside of the district.* It cannot reach property *in rem* wholly situated in other states. It cannot by any decree which it may make in this suit directly reach the dams, reservoirs or ditches belonging to the defendant, located entirely within the state of California."

The Circuit Court of Appeals affirming the decree of the district judge, reviews the authority bearing upon the legal principle that as to certain causes arising partly in one jurisdiction, and partly in another, the right of action will be entertained in either jurisdiction, and coming directly to the point at issue upon this appeal, says:

"In case of nuisance, however, where it is sought to abate the nuisance by injunctive process, it is requisite that the suit be instituted in the jurisdiction where the nuisance is maintained, because it is said the remedy is *quasi in rem,* and must act upon the thing itself which is causing the damage. This was held in the case of Stillman v. White Rock Manufacturing Co., Fed. Cas. No. 13,446 (23 Fed. Cas. 83.)"

Rickey Land & Cattle Co. v. Miller & Lux, 152 Fed. 11, at p. 16.

The principle thus stated is precisely the same as that enunciated by the Supreme Court of Iowa, in the case of Gilbert v. Moline Water Power & M. Co., 19 Ia. 319, cited in appellant's brief filed October 3d, and criticised as unsound by counsel for appellee both in his oral argument, and at page 8 of his last brief.

The decree should be reversed and the bill dismissed.

Dated Tucson, Arizona, December 10, 1908.

EUGENE S. IVES,

Of Counsel for Appellant.

No. 1585

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WONG SEE YING,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

TRANSCRIPT OF RECORD.

Upon Appeal from the United States District Court, for the Northern District of California.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1585

United States Circuit Court of Appeals

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UNITED STATES OF AMERICA.

Circuit District *of the United States, Northern District of California.*

Clerk's Office.

No. ———.

In the Matter of WONG SEE YING, on Habeas Corpus.

Praecipe.

To the Clerk of Said Court:

Sir: Please Issue:

Petition for Writ of Habeas Corpus.

Amended Petition for Writ of Habeas Corpus.

Order Writ Issue.

Writ of Habeas Corpus.

Answer and Return.

Stipulation as to Answer and Return.

Stipulation as to Parties.

Transcript of Testimony Taken at Hearing.

Mem. of Opinion.

Order Writ Discharged and Wong See Ying Remanded to the Custody from Whence Taken.

Petition for Appeal.

Assignment of Errors.

Order Allowing Appeal to Circuit Court of Appeals.

Order Appeal Allowed.

Copy of Traverse and Return.

[Endorsed]: Filed Mar. 20, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

Citation on Appeal (Copy).

UNITED STATES OF AMERICA—ss.

The President of the United States to Hart H. North, Commissioner of Immigration, The Pacific Mail Steamship Company (a Corporation), and to The United States of America, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal of record in the Clerk's Office of the United States District Court for the Northern District of California, wherein Wong See Ying is appellant, and you appellees, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable JOHN J. DeHAVEN, United States District Judge for the Northern District of California, this 30th day of March, A. D. 1908.

JOHN J. DeHAVEN,
United States District Judge.

Service of the within citation by copy admitted this 30th day of March, 1908.

ROBT. T. DEVLIN,
U. S. Attorney.

Attorney for Hart H. North, Commissioner of Immigration.

CHAS. J. HEGGERTY,
Attorney for Pacific Mail Steamship Company, a Corporation.

[Endorsed]: Filed March 30th, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk U. S. District Court.

In the District Court of the United States, in and for the Northern District of California.

No. ———.

In the Matter of WONG SEE YING on Habeas Corpus.

Petition of Wong Hong Ping (Wong Hong).

Wong Hong Ping, being duly sworn, states that he is the petitioner in the above-entitled matter.

That Wong See Ying is unlawfully and illegally imprisoned, detained, confined, and restrained of his liberty, and that the illegality and unlawfulness of said imprisonment, detention, confinement and restraint consist in this, to wit:

That said Wong See Ying is unlawfully imprisoned, detained, confined and restrained of his liberty by the Pacific Mail Steamship Company and H. H.

North, Commissioner of Immigration at the Port of San Francisco.

That said H. H. North claims that said Wong See Ying is not entitled to enter the United States on the ground that said Wong See Ying is not a native of the United States,

That the proofs and evidence, documentary and otherwise, submitted by said Wong See Ying and others on his behalf establish conclusively that said Wong See Ying was born in San Francisco, California, (28) years ago, in a building on the corner of Commercial and Dupont Streets, and that said Wong See Ying departed for the Empire of China with his mother about the year 1880.

That said H. H. North arbitarily and unreasonably declined to believe the proofs and evidence, documentary and otherwise, submitted by said Wong See Ying, and by others in his behalf, in support of his claim that he was born in the United States, and entitled to enter the United States at the port of San Francisco.

That the proofs and evidence, documentary and otherwise, submitted by said Wong See Ying and others in his behalf, in support of his claim that he was born in the United States and entitled to enter the United States, port of San Francisco, were competent, relevant, material and truthful, and established conclusively that said Wong See Ying was born in the United States.

That said Wong See Ying was by virtue of the decision of the said H. H. North, Commissioner of Im-

migration as aforesaid, and of the Department of Commerce and Labor on appeal denying his claim that he was born in the United States, denied his just and substantial right under the constitution and the laws of the United States, and that he did not have a fair and impartial hearing.

That said Wong See Ying, duly prosecuted and appealed from the decision of said Commissioner of Immigration to the Department of Commerce and Labor, and that said decision was affirmed by said Department of Commerce and Labor.

That the evidence taken and investigation made by said Commissioner of Immigration at San Francisco was of a secret character, and that said Wong See Ying was not permitted to be present, either personally or by an attorney, at the taking of said evidence (save his own), or at any of said investigations or hearings held by said Commissioner of Immigration in secret as aforesaid.

That at none of the said secret hearings was said Wong See Ying permitted to be confronted with witnesses against him, if any, and was not apprised or permitted to be informed of the evidence, or the purport thereof, taken and submitted with reference to his said application to be permitted to land in the United States on the ground that he was born in the United States.

WONG HONG,
Character in Chinese.

JOHN C. CATLIN,
Attorney for Petitioner.

Dated San Francisco, Jan. 21st, 1908.

State of California,
City and County of San Francisco,—ss.

Wong Hong, being duly sworn, states that he is the petitioner in the above-entitled proceedings, and that he knows Wong See Ying, and makes the petition on behalf of said Wong See Ying; that he knows the contents of said petition, and believes the same to be true as to all matters stated on his information and belief, and as to those matters he believes it to be true.

That he resides and does business at 1538 Geary Street, San Francisco.

WONG HONG PING,
Character in Chinese.

WONG BEW,
1538 Geary.

Subscribed and sworn to before me this 28th day of January, 1908.

JAS. P. BROWN,
Clerk U. S. Dist. Co.

Order.

Let the writ of Habeas Corpus issued pursuant to the prayer of above petitioner.

[Endorsed]: Filed Jany. 28, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

In the Matter of WONG SEE YING on Habeas Corpus.

Petition of Wong Hong (Wong Hong Ping) on Behalf of Wong See Ying for a Writ of Habeas Corpus.

Wong Hong, being duly sworn, states that he is the petitioner in the above-entitled matter.

That Wong See Ying is unlawfully and illegally imprisoned, detained, confined and restrained of his liberty, and that the illegality, unlawfulness of said imprisonment, detention, confinement and restraint consists in this, to wit:

That said Wong See Ying is unlawfully imprisoned, detained, confined and restrained of his liberty by the Pacific Mail Steamship Company and by H. H. North, Commissioner of Immigration at the Port of San Francisco.

That said H. H. North claims that said Wong See Ying is not entitled to enter the United States on the ground that said Wong See Ying is not a native of the United States.

That proofs and evidence, documentary and otherwise, submitted by said Wong See Ying and others on his behalf establish conclusively that said Wong See Ying was born in San Francisco, California, (28) years ago, in a building on the cor. of Commercial and Dupont Streets; that said Wong See

Ying departed for the Empire of China and with his mother about the year 1880.

That said H. H. North arbitrarily and unreasonably declined to believe proofs and evidence, documentary or otherwise, submitted by said Wong See Ying and others in his behalf, in support of his claim that he was born in the United States and entitled to enter the United States at the port of San Francisco.

That the proofs and evidence, documentary and otherwise, submitted by said Wong See Ying and by others in his behalf in support of his claim that he was born in the United States, and entitled to enter the United States, port of San Francisco, were competent, relevant, material, and truthful, and established conclusively that said Wong See Ying was born in the United States.

That said Wong See Ying was by virtue of the decision of the said H. H. North, Commissioner of Immigration as aforesaid and of the Department of Commerce and Labor on appeal denying his claim that he was born in the United States, denied his just and substantial right under the constitution, and under the laws of the United States, and that he did not have a fair and impartial hearing.

That said Wong See Ying duly prosecuted and appealed from the decision of said Commissioner of Immigration to the Department of Commerce and Labor, and that said decision was affirmed by said Department of Commerce and Labor.

That the evidence taken and investigation made by said Commissioner of Immigration at San Fran-

cisco was of a secret character, and that said Wong See Ying was not permitted to be present, either personally or by an attorney, at the taking of said evidence (save his own) or at any of said investigation or hearing held by said Commissioner of Immigration in secret as aforesaid.

That none of said secret hearing was said Wong See Ying permitted to be confronted with *witness* against him, if any, and was not apprised or permitted to be informed of the evidence, or the purport thereof, taken and submitted with reference to said application to be permitted to land in the United States on the ground that he was born in the United States.

That your petitioner prays that a writ of habeas corpus may be granted directed to the said Pacific Mail Steamship Company and the general manager of said Steamship Company, and to H. H. North, Commissioner of Immigration, commanding them to have the body of said passenger before your Honor, at a time and place therein to be specified, to do and receive what shall then and there be considered by your Honor concerning him, together with the time and cause of his detention, and the said writ, and that he may be restored to his liberty.

Dated, San Francisco.

WONG HONG PING,
Character in Chinese.

JOHN C. CATLIN,
Atty. for Petitioner.

Wong Hong, being duly sworn, states that he is the petitioner in the above-entitled proceedings, and

that he knows Wong See Ying, and makes this petition on behalf of said Wong See Ying; that he knows the contents of said petition, and believes the same to be true as to all matters stated of his knowledge, except as to the matters stated on his information and belief, and, as to those matters, he believes them to be true. That he resides and does business at 1538 Geary St., San Francisco, Cal.

WONG HONG PING,
Character in Chinese.

Subscribed and sworn to before me this 20th day of January, 1908.

[Seal] JOHN FOUGA,
Deputy Clerk U. S. District Court, Northern District of California.

WONG BEW, Interpreter,
1538 Geary St.

ORDER.

Let the writ of habeas corpus issue pursuant to the prayer of the above petitioner.

[Endorsed]: Filed Jany. 21st, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

In the District Court of the United States, Northern District of California.

No. 13,751.

In the Matter of WONG SEE YING on Habeas Corpus.

Order to Show Cause Why a Writ of Habeas Corpus Should not Issue.

Ordered that the Pacific Mail Steamship Company and H. H. North, Commissioner of Immigration at the port of San Francisco, show cause before this Court on Tuesday, January 28, 1908, at 10 o'clock A. M., why a writ of habeas corpus should not issue in accordance with the prayer of the petition herein.

Further ordered that a copy of the petition herein and of this order be served upon said respondents, and upon the United States Attorney for the Northern District of California, on or before January 24, 1908.

Dated January 21, 1908.

JOHN J. DeHAVEN,
Judge.

[Endorsed]: Filed January 21st, 1908. Jas. P. Brown, Clerk. By J. S. Manley, Deputy Clerk.

In the District Court of the United States, Northern District of California.

No. 13,751.

In the Matter of WONG SEE YING on Habeas Corpus.

Writ of Habeas Corpus.

The President of the United States of America, to the Pacific Mail Steamship Co., and the General Manager of said Steamship Company, and

to H. H. North, Commissioner of Immigration, or whoever may have the custody or control of said Wong See Ying, Greeting:

You are hereby commanded that you have the body of the above-named person by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention, by whatsoever name the said person shall be called or charged before the Honorable John J. DeHaven, Judge of the District Court of the United States, for the Northern District of California, at the courtroom of said Court in the City and County of San Francisco, California, on the 20th day of February, A. D. 1908, at 10 o'clock A. M., to do and receive what shall then and there be considered in the premises.

And have you then and there this writ.

Witness, the Honorable JOHN J. DeHAVEN, Judge of the said District Court, and the seal thereof, at San Francisco, in said District, on the 15th day of February, A. D. 1908.

[Seal] JAS. P. BROWN,
Clerk of Said District Court.
By Francis Krull,
Deputy Clerk.

UNITED STATES MARSHAL'S RETURN.

I hereby return that I received the within writ on the 15th day of February, 1908, and personally served the same on the 17th day of February, 1908, on the Pacific Mail Steamship Company, a foreign corporation, by handing to and leaving with A. J. Frey, who is the person designated by said defend-

ant, Pacific Mail Steamship Company, a foreign corporation, under the Statutes of California, as the person upon whom all legal process is to be served in the matters affecting the Pacific Mail Steamship Company, a foreign corporation, in the State of California, a certified copy thereof, in the within entitled cause in the City and County of San Francisco, in said Northern District of California.

C. T. ELLIOTT,
United States Marshal.
By M. J. Fitzgerald,
Office Deputy.

San Francisco, Feb. 18, 1908.

[Endorsed]: Filed February 18th, 1908. Jas. P. Brown, Clerk. By John Fouga, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

No. 13,751.

In the Matter of WONG SEE YING on Habeas Corpus.

Answer and Return of H. H. North, Commissioner of Immigration, to the Writ of Habeas Corpus Herein.

Comes now H. H. North and respectfully makes this answer and return to the writ of habeas corpus issued in the above-entitled matter on February, 1908, and as reasons why the Chinese, Wong See Ying, should not be released upon the hearing of the said writ:

I.

That the petition for writ of habeas corpus herein fails to state any fact or facts from which it can be determined that the applicant for said writ, to wit, the said Wong See Ying, is in fact unlawfully detained or imprisoned, or restrained of his liberty.

II.

Respondent further shows that the said Wong See Ying is an alien Chinese person, and a native of the Empire of China; that he has no right to enter or land within the United States.

That said Wong See Ying arrived in the port and harbor of San Francisco on the steamship "Manchuria" on October 12th, 1907, and at said time came to said port as a passenger upon said vessel directly from the Empire of China; that on his said arrival in said port he made application to this respondent for permission to land and enter the United States of America as hereinafter shown.

That for more that four years last past this respondent has been, and now is, a duly appointed, qualified and acting Commissioner of Immigration at the Port of San Francisco. That as such officer he has had, and now has, charge of the execution of all of the laws of the United States, relating to the landing in, or exclusion from, the United States of all Chinese persons.

That said Wong See King so made application to be permitted to land in the United States, as hereinbefore alleged to this respondent as such officer. That upon the arrival of the said steamship "Man-

churia," as hereinbefore alleged, to wit, on October 16th, 1907, at the port of San Francisco, said vessel was boarded by an officer of the Immigration Service of the United States at said port, to wit, by one P. F. Montgomery, which said officer was acting under this respondent. That at said time said P. F. Montgomery was duly appointed, qualified and acting Immigrant Inspector at this port.

That on said date, to wit, on the said October 16th, 1907, and upon said vessel, while at this port, and before the said Wong See Ying had been permitted to land within the said United States, he, the said Wong See Ying, duly applied to said Inspector to be permitted to land in, and to enter the United *United* States, and he, the said Wong See Ying, was then and there*upon* said P. F. Montgomery, inspector as aforesaid, personally examined in order to ascertain what evidence, if any, the said Wong See Ying might be able to produce in his support of his right to land in and to enter the United States.

That then and there, to wit, on said October 16th, 1907, said Wong See Ying named all of the witnesses who might give any evidence in support of his right to land in or enter the United States.

III.

That thereafter, to wit, on October 23d, October 24th, 1907, November 13th, 1907, and November 15th, 1907, hearings were had under the supervision, direction, and in accordance with the practice of this respondent as such Commissioner of Immigration at said port of San Francisco. That said hearings were

conducted by the said inspector, P. F. Montgomery, and at said hearing all of the witnesses who had theretofore been specified and named as witnesses who might give evidence in support of said Wong See Ying's right to land in or enter the United States were duly examined, and that such witnesses did *de*close to the said inspector at said hearings all of the facts within their knowledge relative to the right of the said Wong See Ying to land in or enter the United States.

That the examination of the said witnesses was made by the said inspector, P. F. Montgomery, and that the same was full and complete.

That said witnesses at said hearings related all the facts within their knowledge, as such witnesses, and each of said witnesses, after being duly and regularly questioned at length and after having made answer to the questions propounded at said hearings, was asked to state anything further with reference to the nativity of or the right of the said Wong See Ying to land in or enter the United States that had been stated in response to the questions propounded at said hearings.

That each of the said witnesses stated at said hearings that the answers by them were all the information which they could give with reference to the nativity of said Wong See Ying or with reference to his right to land in or enter the United States.

That, in addition to examining the witnesses designated by the applicant, the applicant himself was examined at said hearings and permitted to testify

with reference to his right to land in and enter the United States.

That the examination of the said Wong See Ying was full and complete, and that at said examination said Wong See Ying was permitted to testify at length with reference to his nativity and with reference to his right to land in and enter the United States, and was in no manner prevented from giving all the facts within his knowledge with reference to said matters.

IV.

That the said hearings were not secret. That the same were held strictly in accord with rules and regulations 5 and 6, duly promulgated by the Secretary of Commerce and Labor of the United States and in force as regulations governing the admission of Chinese into the United States.

That, as provided in rule 6 last hereinbefore referred to, the examinations of the said witnesses occurred separate and apart from the public and in the presence of Government officials, and without the applicant himself being present.

That said applicant made no request to be present at the examination of the said witnesses offered in behalf of the said applicant, and made no request to be represented by counsel at said examinations. That had such request been made, the said applicant would have been permitted to be present in person and by counsel at such examination of the said witnesses.

That said applicant was not represented by counsel at his own examination, and that said applicant was

examined separate and apart from the public. That, had the said applicant made request to be represented by counsel at his own examination, such request would have been complied with and the said applicant would have been permitted to have counsel represent him at said hearings and at his own examination.

That, in accordance with rule 6, all witnesses presenting themselves on behalf of the said applicant were fully heard, and all were regularly sworn by said immigrant inspector to testify the truth prior to the taking of the testimony.

V.

That, upon the conclusion of the said hearings, to wit, on the 27th day of November, 1907, said Wong See Ying, applicant as aforesaid, was duly and regularly adjudged to be inadmissible, and that it was duly and regularly determined by this respondent that he, the said Wong See Ying, had no right to land in or enter the United States, and that he was an alien Chinese person and a native of the Empire of China.

VI.

That upon its being determined that said applicant had no right to land in or enter the United States, he was, in accordance with the said rule 6, advised of his right to appeal to the Secretary of Commerce and Labor of the United States, and the said applicant was so advised by a notice written in the Chinese language, and thereafter perfected an appeal as permitted by said rule 6.

That in the matter of taking said appeal, said ap-

plicant was regularly represented by counsel. That prior to the taking of the said appeal said applicant was at all times advised by counsel familiar with the rules and regulations herein referred to governing the admission of Chinese into the United States, but neither the said applicant nor his counsel suggested any witnesses other than those examined as hereinbefore mentioned, or any evidence other than that hereinbefore mentioned that could be offered or that should be received in support of the right of the said applicant to land in or enter the United States.

VII.

That upon its being determined by this respondent that a Chinese applicant shall not be permitted to land in or enter the United States under the rules and regulations hereinbefore referred to in accorddance with rules 12 and 13 of the said rules and regulations, further opportunity is afforded, and has at all times been afforded to an applicant so adjudged to be inadmissible to offer further evidence in support of his alleged right to land within the United States.

That after it had been determined by this respondent, as hereinbefore alleged, that the said Wong See Ying was inadmissible and had no right to land in or enter the United States, and after his counsel had been notified of such determination on the part of this respondent, and after the said counsel for the said applicant had been notified of the right of the applicant to appeal, as hereinbefore alleged, said counsel was permitted to examine and make copies

of the evidence upon which said excluding decision was based, in accordance with said rule 6.

That neither said applicant nor his counsel, as permitted under rules 12 or 13, as hereinbefore mentioned, after being so permitted to examine and make copies of the evidence upon which the said excluding decision was based; and after being notified of the said excluding decision, offered no additional evidence of any kind, although having full opportunity so to do in support of the alleged right of the said applicant to be landed in the United States.

VIII.

That the counsel for the said applicant, upon being notified of the right of the applicant to appeal to said Secretary of Commerce and Labor of the United States from said excluding decision, took and perfected an appeal, in behalf of the said applicant, but without offering any additional evidence in accordance with rules 12 and 13 of the rules and regulations hereinbefore referred to.

That upon the taking of the said appeal by the said applicant to the said Secretary of Commerce and Labor, the complete record of the said case, accompanied by all of the evidence, affidavits, statements and briefs submitted in the matter of the hearing of the said application, and accompanied by the views of this respondent in making the said excluding decisions as aforesaid, was, as required by the said rules and regulations, forwarded to the Secretary of Commerce and Labor at Washington, D. C.

That thereupon, and after the said appeal was duly and regularly perfected in accordance with the said rules and regulations, the said Secretary of Commerce and Labor duly and regularly determined on the 17th day of January, 1908, that the said Chinese applicant, to wit, the said Wong See Ying, was inadmissible, was an alien Chinese person and a native of the Empire of China, and had no right to land in or enter the United States; that his said appeal should be dismissed, and that he should be returned to the country from whence he came, at the expense of the transportation agency owning the vessel on which he had been brought to this country. That all the evidence herein mentioned was fully considered on said appeal.

That all of the hearing had for the purpose of determining the right of the said Chinese applicant to land in or enter the United States were full, fair and regular, and that the said applicant at all the times had full and fair opportunity to be heard and to offer evidence in support of his right to land in or enter the United States.

That the detention of the said Wong See Ying by this respondent and by the other respondent herein, to wit, the Pacific Mail Steamship Company, is for the purpose of deporting the said Wong See Ying to the country from whence he came, to wit, the Empire of China, in pursuance to the said order of deportation and in pursuance of the requirements of the law and of the said rules and regulations hereinbefore referred to, required that any Chinese person

refused admission into the United States, must be returned to the country from whence he came at the expenses of the transportation agency owning the vessel or conveyance bringing such Chinese person.

IX.

That all acts and things done by this respondent in conducting said hearings, or in detaining the said Wong See Ying, were done and performed by this respondent acting as such Commissioner of Immigration, or done and performed by officers acting under the direction of this respondent as such Commissioner of Immigration at said port of San Francisco, and under and in pursuance of the laws of the United States relating to the exclusion of Chinese persons, and under the said rules and regulations promulgated and existing hereinbefore referred to.

That rules 5 and 6, 9, 12, and 13 of the said rules and regulations are as follows:

Rule 5. Immediately upon the arrival of Chinese persons at any port mentioned in rule 4 it shall be the duty of the officer in charge of the administration of the Chinese exclusion laws to have said Chinese persons examined promptly, as by law provided, touching their right to admission; and to permit to land those proving such right.

Provided, That nothing contained in these regulations shall be construed to authorize the boarding of vessel of foreign navies arriving at ports of the United States for the purpose of enforcing the provision of the Chinese exclusion laws.

Rule 6. The examination prescribed in rule 5 shall separate and apart from the public, in the presence of Government officials and such witness or witnesses only as the examining officer shall designate: *Provided however,* That all witnesses presenting themselves on behalf of any Chinese applicant be fully heard. If upon the conclusion of the hearing the Chinese applicant is adjudged to be inadmissible, he shall be advised of his right to appeal by a notice written or printed in the Chinese language, and his counsel shall be permitted, after notice of appeal has been duly filed, to examine and make copies of the evidence upon which the excluding decision is based. If there is a consular officer of China at port where the examination is held, he shall also be notified in writing that the said Chinese applicant has been refused a landing, and shall be permitted to examine the record.

Rule 9. Every Chinese person refused admission to the United States, being actually or constructively on the vessel or other conveyance by which he was brought to the port of entry, must be returned to the country from whence he came, at the expense of the transportation agency owning such vessel or conveyance.

Rule 12. Every Chinese person refused admission under the provisions of the exclusion laws of the decision of the officer in charge at the port of entry may take an appeal to the Secretary of Commerce and Labor by giving written notice thereof to the

officer in charge within two days, exclusive of Sundays and legal holidays, after such decision is rendered.

Rule 13. Notice of appeal provided for in rule 12 shall act as a stay upon the disposal of the Chinese person whose case is thereby affected until a final decision is rendered by the Secretary of Commerce and Labor; and within five days after the excluding decision is rendered, unless further delay is required to investigate and report upon new evidence, the complete record of the case, together with such briefs and affidavits and statements as are to be considered in connection therewith, shall be forwarded to the Secretary of Commerce and Labor by the officer in charge at the port of arrival, accompanied by his views thereon in writing. If, on appeal, evidence in addition to that brought out at the hearings is submitted, it shall be made the subject of prompt investigation by the officer in charge and be accompanied by his report.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

H. H. North, being first duly sworn, deposes and says, that he is the respondent in the foregoing answer and return. That he has read the same and knows the contents thereof, and that the matters therein set forth are true to the best of his knowledge, information and belief.

H. H. NORTH.

Subscribed and sworn to before me this 19th day of February, 1908.

[Seal] HARRY L. HORN,

Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Feb. 20, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

In the Matter of WONG SEE YING on Habeas Corpus.

Stipulation that the United States of America shall be Deemed a Party; that Answer and Return of H. H. North shall be Deemed Answer and Return of United States, etc.

It is hereby stipulated that the United States of America may appear in, and shall be deemed a party to, the above-entitled proceedings. That H. H. North, the respondent in the above-entitled proceedings, is an official of the United States, to wit, a Commissioner of Immigration, as set forth in the answer and return of the said H. H. North made and filed herein.

That the answer and return of said H. H. North made and filed herein, shall be deemed the answer and return of the said United States, and shall be taken as setting forth the reasons why the United States

claims to be entitled to have the said Wong See Ying detained and held in custody.

Dated February, 18th, 1908.

JOHN CATLIN,
STIDGER & STIDGER,
Attys. for Petitioner.

[Endorsed]: Filed Feb 20, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

No. 13,751.

In the District Court of the United States, in and for the Northern District of California.

In the Matter of WONG SEE YING on Habeas Corpus.

Stipulation that Answer and Return of H. H. North shall be Deemed Part of Answer and Return of Pacific Mail S. S. Co., etc.

It is hereby stipulated that the answer and return to the writ of habeas corpus issued herein, made and filed by H. H. North, Commissioner of Immigration, shall be taken and deemed to be a part of the answer and return of the respondent, Pacific Mail Steamship Company. And it is admitted that the Pacific Mail Steamship Company detains and intends to detain the petitioner Wong See Ying only for the purpose of carrying out *out* the lawful orders of the immigration officials of the United States directing the deportation of the said Wong See Ying, made in the matter of the alleged hearing of the application of the said Wong See Ying to land in the United States,

which said alleged hearing is set out in the answer and return of the said H. H. North.

Dated February, 18th, 1908.

JOHN C. CATLIN,
STIDGER & STIDGER,
Attorneys for Petitioner.

_____,
Attorney for Respondent H. H. North.

_____,
Attorney for the Pacific Mail Steamship Company.

[Endorsed]: Filed Feb. 20, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States in and for the Northern District of California.

Hon. J. J. DE HAVEN, Judge.

No. 13,751.

In the Matter of WONG SEE YING, for Writ of Habeas Corpus.

Hearing.

Thursday, February 20th, 1908.

J. C. CATLIN, Esq., and O. P. STIDGER, Esq., for Petitioner.

GEORGE CLARK, Esq., Asst. U. S. Attorney, for the United States.

(This matter now came on for hearing before the Court, and the following proceedings were had.)

(Mr. Catlin stated the case for the petitioner.)

Testimony.

H. H. NORTH, called for the petitioner, sworn.

Mr. CATLIN.—Q. Mr. North, state your name and your official position?

A. H. H. North; United States Commissioner of Immigration.

Q. Do you remember the case of an applicant for admission to the United States named Wong See Ying? A. Yes, sir, I recollect the case.

Q. Did you personally have anything to do with that application? A. I did.

Q. Did you hear the witnesses?

A. I did not.

Q. What was your connection with the case?

A. Do you mean by that my personal connection?

Q. Yes.

A. I reviewed the record in the case and entered a denial, and subsequently forwarded the appeal to the Department at Washington.

Q. You perused the record?

A. Yes, sir.

Q. That was made before Deputy Inspector Montgomery?

A. Made by Inspector Montgomery, yes. He is not a deputy; he is a Chinese Inspector.

Q. Mr. North, do you know the term used in the Immigration Bureau "Raw native cases"?

A. I think I invented that term, yes.

Q. Will you state what a raw native case is?

A. A raw native, according to the term that is used in our service, applies to a Chinaman who arrives at this port from China, and claims to have been here

(Testimony of H. H. North.)

prior to the 1st of June, 1882, and to have returned to China with his parents prior to that date. It is to distinguish that class of cases from those cases which have been visaed out of this port by officers of this service, claiming the right to return as natives.

Q. Was the case of Wong See Ying what you call a raw native case?

A. My recollection is that it was; the record will show.

Q. What is the custom of the Immigration Commissioner or Bureau in regard to the raw native cases, allowing them to land or their refusal?

A. I do not know there is any hard-and-fast rule. Every case stands on its own merits. There have been such cases landed, and many have been denied.

Q. Have any of those cases been landed in the last year? A. Yes, sir.

Q. There have been some? A. Yes, sir.

Q. Have there been over one or two landed in the last year?

Mr. CLARK.—I submit that is irrelevant.

The COURT.—The objection is sustained.

Mr. CATLIN.—I will state that the purpose of the question is, it is understood, or I so understand it, that a raw native case will not be landed unless there are a multitude of witnesses and some of them white; that a raw native will not be landed on Chinese testimony alone. I believe the law does not contemplate such a thing.

The COURT.—The witness has stated there is no hard-and-fast rule; that each case depends on its own

(Testimony of H. H. North.)

merits; in some instances they have been landed, and many refused. Introduce your evidence showing what took place, and what did not take place.

Mr. CATLIN.— I except to the ruling.

Q. Do you remember, Mr. North, how many witnesses were called in the Wong See Ying case?

A. I can refresh my memory from the record.

Q. I have no objection to your doing that.

A. (After examination.) In addition to his own testimony, there were three Chinese examined before the case was denied by me. The record does not show there were any examined afterward.

Q. Can you remember for what particular reason you disbelieved the testimony of those three witnesses?

A. I cannot remember it without reviewing the case; no.

Q. Would you believe Chinese witnesses under any circumstances? A. Certainly.

Q. Would you land a case where there was nothing but Chinese witnesses?

A. I have landed thousands of such.

Q. Within the last two years?

A. Yes, sir.

Q. These raw native cases?

A. I could not say as to that.

Q. Have you got your summing up of this case in your pocket?

A. No, sir, it is in this record.

Q. Will you refresh your memory from that?

(Testimony of H. H. North.)

Mr. CLARK.—Look at pages 34 and 35 of the record and your opinion will be found there.

A. My conclusions are found in the written review by me on pages 34 and 35. As to just what led to the conclusion, that I probably could hardly tell without reading the entire record. I state "The evidence is wholly unconvincing, and that I am neither arbitrary nor unfair in rejecting it entirely." The record goes on to show that the applicant claims to have departed with his mother in 1880, and that his father or alleged father, a Chinese laborer, is reported to have left this city for China, something over a year prior to the date of the decision on November 27th last. The evidence on his behalf is given by three Chinese persons. I suppose the record speaks for itself as to what they testified to. Without reading all the testimony again, I cannot state at this time what it was.

Mr. CATLIN.—Q. Do you remember that the testimony of the three witnesses for the applicant was practically the same—that is, the testimony of one not contradicting the other?

A. I do not remember that. I have looked over so many other cases since then that it is impossible to keep the facts fresh in my mind.

Q. Do you remember this, Mr. North: The applicant testified that his father was a maker of new clothes on sewing-machines in San Francisco, and the witnesses in San Francisco testified that the father of the boy was not a maker of new clothes

(Testimony of H. H. North.)

but was a laundryman, who laundried new clothes. Do you remember that?

A. No, sir, I do not remember that.

Mr. CATLIN.—I wish to introduce in evidence the whole of this record and have it marked Exhibit "A."

The WITNESS.—If it is possible to put in a certified copy of that, I should like to have it done. I was directed by the Department at Washington to return that. It is part of the records at Washington.

Mr. CLARK.—We will have a copy made.

Mr. CATLIN.—I will make no point on that.

The COURT.—This particular paper they do not want to leave on the files of the Court as it must be returned to Washington.

Mr. CATLIN.—It is satisfactory to me in any way it is given to your Honor. I do not care whether it is this or a copy.

Mr. CLARK.—Do you intend to have a copy of that made to put in evidence? If you desire to have a copy made and put it in we have no objection.

Mr. CATLIN.—I do desire to have a copy made.

The COURT.—A certified copy of the record.

Mr. CATLIN.—Yes.

Q. Mr. North, I am going to read from a letter from you, dated November 27th, 1907, "Office of the Commissioner, San Francisco, California. Chinese Inspector in Charge.

"As to this case, the applicant is what we call a 'raw native,' that is, he claims to be 28 years of age;

(Testimony of H. H. North.)

to have been born in the notorious Spanish Building, this city, in 1879, and at the age of one year, or in 1880, to have departed for China with his mother, where he has since resided. This departure of course, is before the beginning of our records. He picks out for a father a Chinese laborer who left this port for home about a year since; he offers in his own behalf the testimony of 3 Chinese witnesses. It is of the ordinary character in applications of this sort. By going over our files, hundreds, and probably even thousands of records may be found wherein the testimony would not vary in any material particular, and thousands of like raw natives have claimed the Spanish Building as a birthplace."

Do you remember that? A. Yes, sir.

Mr. CATLIN.—That portion of the record, if your Honor please, containing the testimony of the three witnesses before the Bureau, is mainly what I want to put in evidence before the Court. I do not see any reason or purpose in putting all this record in evidence. I want the testimony of those three witnesses put in evidence so that your Honor may see it, and may see that that testimony does not justify any such finding by the Commissioner, or any other finding than that it was true and uncontradicted, absolutely, and it is disbelieved, by the language of the Commissioner simply because the man was a raw native.

The COURT.—Let me understand. You offer in evidence the testimony taken before the Commissioner here.

(Testimony of H. H. North.)

Mr. CATLIN.—The testimony taken before the Commissioner here.

The COURT.—The testimony of those three witnesses.

Mr. CATLIN.—Yes.

The COURT.—And his judgment upon that.

Mr. CATLIN.—That is all I desire.

The COURT.—The only question is, who shall make the copy of the paper. You can read it into the record right here.

Mr. CATLIN.—I will make it.

Mr. CLARK.—That is agreeable, but I suggest that instead of offering the testimony of the witnesses, you offer all the testimony taken—the testimony of the applicant.

Mr. CATLIN.—Very well.

The COURT.—I want to know something about this record, when it is to be made up.

Mr. CATLIN.—We will make it up at once.

The COURT.—Read the whole thing and let the Reporter take it down.

Mr. CATLIN.—It is rather long.

The COURT.—But it has to be returned to Washington. If your client was able to pay for a certified copy, I would require him to make it. I presume he is not able to do that.

Mr. CATLIN.—We will consent that Mr. Bennett copy all this testimony into the record here.

The COURT.—Then it will be considered as in now.

(Testimony of H. H. North.)

(The testimony referred to will be found in this record at page 24 to 35; 37 to 44; and 49 to 53.)

Mr. CATLIN.—Q. Mr. North, the absolute right of entry or denial, the granting the application, is in your hands, other than the appeal that afterwards could be taken from your judgment. I wish to ask you, after having read that language from your communication, if you gave the testimony of Chinese witnesses in a raw native case—I am speaking of no other cases but in a raw native case—if you gave the testimony of the Chinese witnesses fair and sound consideration?

A. Are you speaking of that case, or generally?

Q. I am speaking of generally, and this case in particular.

The COURT.—Q. As to this case, that is what you are to answer. A. I certainly did.

Mr. CATLIN.—I think that your Honor in examining this testimony will see that that discrepancy that I spoke of a moment ago is the only contradiction.

The COURT.—Very well. Are you through with the witness?

Mr. CATLIN.—Yes.

Cross-examination.

Mr. CLARK.—Q. The testimony in the case was taken before Mr. Montgomery, the inspector, and reduced to writing? A. That is correct.

Q. By the official stenographer of your office?

A. By an official stenographer.

(Testimony of H. H. North.)

Q. And then reviewed by you?

A. And then reviewed by me.

Q. That is the usual proceeding in the office?

A. That is the usual proceeding.

Q. You have spoken of something in the record. After the review you arrived at the opinion referred to in this case *case,* which has been mentioned by Mr. Catlin, on pages 34 and 35? A. Yes, sir.

Mr. CLARK.—We desire to have the opinion of Mr. North on pages 34 and 35 go into the record.

(The opinion of Mr. North, referred to, will be found in this record at page 60.)

Q. Did you read all the evidence, Mr. North?

A. I undoubtedly did. That is my custom, and I undoubtedly did it in that case.

Q. You also had before you, at that time, the recommendation of the inspector who had particular charge of the case, that is, Mr. Montgomery?

A. That is correct.

Q. And you reviewed that also?

A. Yes, sir.

Mr. CLARK.—We desire that that go in in connection with Mr. North's opinion. It is incorporated in the record and is the report of the inspector, made to Mr. North.

(The recommendation of the inspector will be found at pages 45 to 48; 54 to 59.)

The WITNESS.—Also the recommendation of the inspector in charge.

Mr. CLARK.—Q. After you arrived at the opinion mentioned on pages 34 and 35 of the record, was

(Testimony of H. H. North.)

any notice of the result of that opinion given to the applicant or to his attorney?

A. Given to the applicant and probably his attorney.

Q. Who was his attorney? A. Mr. Stidger.

Q. The gentleman sitting here?

A. Yes, sir.

Q. That notice was given by you, the giving of the same being required under your rules and regulations?

A. Of the Department Rules and Regulations.

Q. After that notice was given, was there any opportunity afforded for the applicant to put in further proof prior to the time his papers were forwarded to Washington?

A. Certainly. Any additional testimony they desire to produce, the witnesses would be examined and the testimony incorporated in the record.

Q. Do you know if they availed themselves of that opportunity?

A. My recollection is that they offered no additional evidence.

Q. You subsequently forwarded your opinion and the entire record to Washington?

A. Yes, sir, that is correct.

Q. To whom?

A. To the Commissioner General of Immigration.

Q. That contained all the evidence acted on by you? A. Yes, sir.

Q. And a complete record of the case?

(Testimony of H. H. North.)

A. Yes, sir.

Q. What action did the Secretary of Commerce and Labor take on the matter finally?

A. The Secretary dismissed the appeal and ordered the applicant deported to China.

Q. The dismissal of the appeal is simply a confirmation of the view that you took in the matter?

A. A confirmation of my findings.

Q. A denial of the application?

A. Yes, sir.

Q. That is the customary method in which your action is affirmed by the Department at Washington? A. That is correct.

Q. You are holding the Chinese in this case for deportation under your order, and the final order of the Secretary of Commerce and Labor in this matter, and have turned him over to the steamship company for deportation? A. Yes, sir.

Q. You hold him under no other authority than that, Mr. North? A. No other authority.

Redirect Examination.

Mr. CATLIN.—Q. The only circumstances under which you allow counsel to be present at all on any of these hearings is under an amendatory rule of the Department of Commerce and Labor that has not been plead in this case?

A. Under a letter of instructions dated the 31st of May last, which permits the presence of counsel and interpreter.

Mr. CATLIN.—That rule is in our traverse, if your Honor please. That rule allows counsel to be

(Testimony of H. H. North.)

present at the examination of the witness but not of the applicant. It does not allow him to open his mouth. He can simply be present and see what goes on.

The COURT.—Call your next witness.

Mr. CATLIN.—I have four or five Chinese witnesses, three of whom were witnesses before the Bureau, and one or two who were not present before the Bureau, by whom I would like to prove that Wong See Ying is a citizen of the United States.

The COURT.—I will hear that proof after it has been determined whether he had a fair trial.

Mr. CATLIN.—In the opinion of the Supreme Court of the United States, handed down in the Chin Yow case, it was held, as I read the case, that when a citizen, or one who desires to prove his citizenship of the United States, appears in a United States Court, that the fiat of the Commissioner must necessarily fall. From the reasoning in that case, I understand that if I bring witnesses before a United States Court to prove that citizenship in a hearing of this kind, I should be given a right to do it. I desire to offer five witnesses and will take the ruling of the Court on it so that I can except. I will call their names: Wong Hing Ping; Wong Woo; Wong Sai Fung; three merchants; Wong Bew, another merchant; Wong Ock; Wong Sun Jack, a merchant of Yreka, and superintendent of a mine, and Wong Jack, a laborer in Oakland. I desire to offer those witnesses to prove that the applicant in this case is a citizen of the United States.

(Testimony of H. H. North.)

Mr. CLARK.—To which offer we object as incompetent, irrelevant and immaterial. The sole issue before the Court is whether the applicant in this case had a fair hearing. That is the ground set forth in the petition.

Mr. CATLIN.—A fair hearing in good faith.

The COURT.—I think the Court must first determine whether or not this petitioner has had his hearing such as the law contemplates before the Commissioner of Immigration. If he has had such a hearing, as a matter of course, this Court cannot go any further.

Mr. CLARK.—That is the express effect of the ruling referred to by counsel.

The COURT.—For the present, until we dispose of that branch of the case, I will not hear this testimony that you offer. That may be competent hereafter, if the Court determines that the petitioner has not had a fair hearing.

Mr. CATLIN.—Then I will except. I want to make that offer of the five witnesses, so that I can have the exception in the record in due form.

The COURT.—I simply decline to hear the testimony at present. If I reach the conclusion that the petitioner has not had the hearing before the Commissioner that the law contemplates, then, of course, that testimony will be relevant and proper.

Mr. CATLIN.—May I file with the Court in the next two days a memorandum of authorities as to

(Testimony of H. H. North.)

whether he had a fair hearing or not, as is contemplated by the law?

The COURT.—If you are not prepared to argue your case now, I have no objection.

Mr. CATLIN.—I understood that your Honor was going to determine this point first.

The COURT.—That is the very point I shall determine first. I might sit here for three weeks examining witnesses as to the citizenship of this petitioner, and after I got through with it determine it was not relevant; that the petitioner had a fair hearing before the petitioner. Is that all the testimony you have now?

Mr. CATLIN.—That is all the testimony I offer now.

The COURT.—What is the testimony on the other side.

Mr. CLARK.—I will call Mr. Montgomery.

P. F. MONTGOMERY, called for the United States, sworn.

Mr. CLARK.—Q. What was your official position in the year 1907?

A. United States Chinese Inspector and Acting Immigration Inspector.

Q. At the port and harbor of San Francisco?

A. Yes, sir.

Q. Under what official —Mr. North, Commissioner of Immigration? A. Yes, sir.

(Testimony of P. F. Montgomery.)

Q. Do you remember a certain time of the arrival of a Chinese applicant in this port called Wong See Ying? A. Yes, sir.

Q. He was a Chinese person, was he?

A. Yes, sir.

Q. Where did you first encounter or have any dealing with the Chinese with reference to his right to land in the United States?

A. According to regular custom, aboard of the ship—the ship that he came in on.

Q. At that time, what did you do?

A. I took a preliminary statement from him.

Q. From the Chinese?

A. From him directly through an interpreter.

Q. You had an official interpreter there?

A. Yes, sir; we always do.

Q. What occurred at that time was subsequently transcribed by the official interpreter?

A. Stenographer.

Q. And has already been introduced in evidence. It is part of the evidence at page 5 of the record?

A. Yes, sir.

Q. The object and purpose of that was what, that inquiry that you made of the Chinese at the time?

A. Ascertaining who his attorney was, and ascertaining who his witnesses were, for the purpose of having them heard.

Q. With reference to his right to land in the United States?

(Testimony of P. F. Montgomery.)

A. With reference to his right to land in the United States.

Q. Where did you make this inquiry—aboard of the vessel?

A. Aboard of the vessel as soon as it got in.

Q. On October 16th, 1907?

A. Whatever date is on that paper.

Q. The date is shown on the transcript of the testimony?

A. It is always shown.

Q. Thereafter was a hearing had for the purpose of determining whether the Chinese had a right to enter the United States?

A. That Chinaman, yes.

Q. Where was that hearing had?

A. In our office, room 78 U. S. Appraisers' Building.

Q. Do you know whether the witnesses which were there examined were the witnesses mentioned by the Chinese applicant?

A. To the best of my recollection, they were.

Q. That is your usual custom?

A. Yes, sir.

Q. You did not depart from it in any respect at this time? A. No, sir.

Q. Were the witnesses sworn at that hearing?

A. Yes, sir.

Q. The applicant sworn? A. Yes, sir.

Q. You propounded the questions through an official interpreter? A. Yes, sir.

(Testimony of P. F. Montgomery.)

Q. And had an official stenographer there?

A. Yes, sir.

Q. The testimony was subsequently transcribed?

A. Yes, sir.

Q. And is the testimony mentioned in this record? A. Yes, sir.

Q. You yourself then rendered an opinion after an examination of these *witness* to Mr. North, did you? A. Yes, sir.

Q. That is the opinion which is set out in this record to which reference has already been made?

A. Yes, sir.

Q. Did you at that time examine all the witnesses that were offered by this applicant? Did you deny him any right to produce witnesses at the time?

A. No, sir.

Q. You examined all the witnesses who were offered and the applicant himself? A. I did.

Q. I will ask you whether you reviewed all the testimony offered on behalf of the applicant before you made your recommendation to the Commissioner of Immigration in this case.

A. I did; that was necessary.

Q. That is the duty imposed upon you?

A. Yes, sir.

Q. In conducting the hearings?

A. My report would not be an intelligent report if it did not.

Q. That hearing was conducted under the direction of Mr. North, as Commissioner of Immigration at the port and harbor of San Francisco?

(Testimony of P. F. Montgomery.)

A. It was. An official examination.

Q. Who was present?

A. The examining inspector; the official crew, the official stenographer and interpreter; three Government officers. The Chinese witness was present, and in that case there were no other parties present.

Cross-examination.

Mr. CATLIN.—Q. Was the applicant present at the time of the examination of his witnesses?

A. No, sir.

Q. Were the witnesses present at the time of the examination of the applicant? A. No, sir.

Q. Was the applicant notified that he had a right to be present at the time of the examination of his witnesses? A. To my knowledge, no.

Q. He was not?

A. To the best of my knowledge and belief.

Q. Were the witnesses notified that they had a right to be present at the examination of the applicant? A. They were not.

Redirect Examination.

Mr. CLARK.—Q. Do you know whether the applicant had appeared through an attorney prior to the time of the hearing? Take a look at this record. You prepared it yourself.

Mr. CATLIN.—We will admit that the applicant had an attorney.

Mr. CLARK.—Q. Had he appeared by an attorney before you prior to the time of this hearing?

A. On page 2 of the record is our regular form,

(Testimony of P. F. Montgomery.)

which is filled out by an attorney, which is called an appearance notice. We accepted that as the official appearance of the attorney on behalf of the applicant in this case. It is a matter of record that it was accepted by me as the official appearance of Mr. O. P. Stidger.

Q. And signed?

A. Signed by Mr. Stidger in his writing, which I recognize.

Q. Do you know whether Mr. Stidger knew of the fact that the hearing was to proceed in this matter?

Mr. CATLIN.—I object to that question.

The COURT.—I overrule the objection.

Mr. CLARK.—Q. Do you know whether Mr. Stidger knew of the fact that the hearing was to proceed in this matter, the hearing with reference to the right of the Chinese to land in the United States?

A. I do not see that there can be any question as to that.

Q. What is the practice in regard to the appearance of the attorney, and what notice is given him with reference to the hearing, after he appears?

A. The applicant arrives, and he evidently notifies the attorney himself through some of his friends, because the attorney appears on the scene as soon as he arrives. He is notified officially of the arrival through the bookkeeper. He takes the record from our book and the number, and he fills out this notice for the purpose of handling his end of the case.

(Testimony of P. F. Montgomery.)

Q. Do you know whether Mr. Stidger in this case offered to produce any witnesses on behalf of the Chinese other than those that you saw, and the evidence that you took? A. No, sir.

The COURT.—Q. Let me understand. Immediately after the appearance of the attorney in the case you proceeded, without giving him any notice whatever, to try the case? A. Oh, no.

Q. Do you know whether this attorney here who appeared for the petitioner was present at the examination, or whether he knew anything about it?

A. I do know in this case that he did know about the appearance, and knew who the witnesses were going to be, and arranged wtih me who those people were, and the day they were going to be there, which is the method in all of the cases I have handled since I have been in this port, 13 years. It is generally necessary to confer with the attorney.

Q. Then he had notice of the hearing?

A. He had.

Q. That point is covered in writing in this case.

Mr. CLARK.—Q. Let me ask you a question: The Department itself attends to the subpoenaing of the witnesses who are named on behalf of the applicant—the calling of the witnesses?

A. The examining inspector fills out a blank form of subpoena from information given him by the applicant direct. The name is given, and it is our custom to have the applicant write the name of his father or mother—whichever it is—in Chinese itself,

(Testimony of P. F. Montgomery.)

the Chinese characters for one word varying, so that it puts the exact name on the subpoena so that that party will appear.

Q. Do you have those served by a Chinese interpreter?

A. Those are served by a Chinese interpreter, a Chinaman himself familiar with the Chinese people, who explains to them in their own language.

Q. That was done in this case?

A. Yes, sir; the subpoena should be a matter of record.

Mr. CATLIN.—I am willing to admit that those subpoenas were regularly issued, and that an attorney appeared as far as he could appear under the supplemental rule of May 31st, 1907, and that he had a right to be present at the examination of the witnesses.

The WITNESS.—Your Honor asked me whether the attorney was notified. On page 18 of the record is the memorandum of the attorney in the case, which reads "In Re 192 Manchuria, a native. In answer to your request to furnish the witnesses who signed the affidavits in said cause, April 19th, 1907, as the witnesses who signed the affidavits dated October 23d, 1907, have appeared and testified. Upon investigation, I find that the witnesses who signed the affidavits of April, 1907, are the same persons who signed the affidavit of October 23d, 1907; in one instance the witness gives another name under which he is known." There was some question as to

(Testimony of H. H. North.)

whether it was the same witness who had appeared; that covers that point.

The COURT.—Q. Who signed that?

A. Mr. O. P. Stidger, the attorney of record in the case.

H. H. NORTH, recalled for the United States.

Mr. CLARK.—Q. Some mention was made of a rule that prevailed at the time of this hearing with reference to the right of an attorney to appear at the time of the examination on behalf of the applicant. What was that regulation?

A. You have, I think, there a copy of the letter. It is a letter addressed to me.

Q. I guess it is in that record.

A. It is a letter addressed to me by the Secretary of the Department of Commerce and Labor, under date, I think, of May 31st, last, which accorded the applicant the right of being represented at the hearing of all witnesses, and the applicant himself, according to my rule as well; by counsel and by interpreter; not, however, to take part in the examination of the witnesses, but for the purpose of seeing that a due and proper hearing was accorded to the applicant and his witnesses.

Q. This is a copy of that particular regulation, Mr. North, which was in vogue in your particular department at that time (handing)?

A. Yes, sir, it is a department letter. This is a carbon copy. The numbers are indistinct, I think 15053-2-C of May 31st, 1907, addressed to Commis-

(Testimony of H. H. North.)

sioner of Immigration, San Francisco, California, signed F. P. Sargent, Commisioner General, approved Lawrence O. Murray, Assistant Secretary, he being the Assistant Secretary of the Department of Commerce and Labor.

Mr. CLARK.—Mr. North is willing to have a complete copy of the record made in the case, if your Honor please. The record explains a great many of the circumstances, and we desire to offer the entire record, the original of which Mr. North has.

Mr. CATLIN.—We have no objection to that.

Mr. CLARK.—We ask that it be marked "Respondent's Exhibit 1." (The record will be found from page 24 to 64, inclusive.)

Cross-examination.

Mr. CATLIN.—Q. When an attorney appears before the Immigration Commissioner, you adhere to the ruling laid down in the letter of the 31st of May, 1907?

A. If he appears and makes a request, by the terms of that letter, I am governed by my construction of that letter.

Q. This is a strict rule, you understand. You keep the rule strictly. You do not allow an attorney any privileges that that rule does not allow?

A. I endeavor to keep attorneys within the various rules and regulations prescribed by the department, that being undoubtedly intended as a modification of the last printed rules.

(Testimony of H. H. North.)

Q. An attorney is not allowed to object to a question?

A. That letter speaks for itself, according to my recollection of the letter and interpretation of it. The intention of the letter is to assure the applicant and his witnesses of a fair hearing, of a fair interpretation; to assure them that no evidence which they wish to offer will be suppressed in any way, or modified or changed by the interpreter.

Q. I have read the rule and I know what it requires. I say under this rule or under your custom and procedure, the rule of your court there is that an attorney cannot even speak in that examination in relation to the matter before you at the time?

A. The attorney cannot ask the question, if that is what you mean. He cannot seek to draw out from the witnesses any evidence. He has a right to object that evidence is being suppressed, or that the examination is not being properly conducted. There would be no other purpose for it.

Q. Is it not the purpose of this rule that an attorney can go before the Immigration Commissioner with an interpreter only for the purpose of seeing that the questions and answers are correctly interpreted from Chinese into English, and English into Chinese, and for no other purpose?

A. No, sir, I do not so consider it.

The COURT.—I suppose the rule speaks for itself.

(Testimony of H. H. North.)

Mr. CATLIN.—I have read the rule a great many times, and I cannot determine what the attorney would be allowed under it.

The COURT.—I have no doubt he would be allowed to suggest the bringing in of other witnesses, but not to take part; not to interfere with or object to questions, or insist that other questions be asked. That is the purpose of it. He is to see that the witnesses are fully examined. If they are not, I have not any doubt but what he would have the right to request the Inspector to proceed further, and if he did not, he could take his objection to it and make it a part of the record.

Mr. CATLIN.—I do not think Mr. North will answer in that way.

Mr. CLARK.—He has already answered.

The COURT.—I have never read it, but I assume that that is it.

Mr. CATLIN.—I do not think Mr. North will confirm your Honor's idea.

The COURT.—One purpose, I suppose, is to confine the evidence to what the witnesses testify to without any suggestions from the attorney.

Mr. CATLIN.—Q. Can an attorney make a suggestion to you as to what questions you shall ask?

A. Certainly. I have always encouraged attorneys coming to me, or going to Mr. Mehan, the Chinese Inspector in Charge, as to any suggestions they have got to offer in regard to the case.

Mr. CLARK.—That is all.

Testimony closed.

Record of Chinese Bureau.

Affidavit of Wong Hong and Wong Woo.

Photograph of Wong See Ying.

State of California,
City and County of San Francisco, Cal.—ss.

The undersigned, being sworn, say each for himself, and not one for the other, that his name and address is as undersigned, and he identifies the photograph attached hereunto as a true likeness of Wong See Ying, a native-born citizen of the United States, he having been born in the City and County of San Francisco, State of California, twenty-eight (28) years ago, at a building situate on the corner of Commercial and Dupont Streets, San Francisco, Cal. That the said Wong See Ying departed for China about 1880 with his mother, where he has since continued to reside. That the father of said applicant departed for China about one year ago. That your affiant has visited the said native in China and identifies him as stated aforesaid.

That your affiant causes this affidavit to be prepared in order to facilitate the identification, travels and return to the United States of the said Wong See Ying.

Name.	Address.
Wong Hong.....	1588 Geary St.
Wong Woo.....	do

Subscribed and sworn to before me, this 19th day of April, 1907.

[Seal] CHARLES D. O'CONNOR,
Notary Public.

Letter Dated October 15, 1907, from O. P. Stidger to Charles Mehan.

San Francisco, Cal., Oct. 15, 1907.

Mr. Charles Mehan, Inspector in Change, Chinese Division, Immigration Service, San Francisco, Cal.

Sir: I have been employed to represent Wong See Ying, No. 192 ex S. S. ——— 190——, who has applied for admission at this port as a ———.

Respectfully,
O. P. STIDGER,
Attorney for Applicant.

Address.
Phone.

Testimony on Board S. S. Manchuria, Dated October 16, 1907.

On Board S. S. "Manchuria,"

San Francisco, Cal., Oct. 16, 1907.

#192—WONG SEE YING.

Class: Native.

Inspector: P. F. MONTGOMERY.

Interpreter: CHIN JACK.

Ex. S. S. "Manchuria," Oct. 12-07.

Stenographer: H. W. C.

Q. What is your name?

A. Wong See Ying.

(Testimony of Wong See Ying.)

Q. Who is your attorney, representative or go-between in this case?

A. My cousin, Wong Ping, of Foo Fung, 742 Washington Street, San Francisco, has charge of my case.

Q. Give me the name and address of any witnesses you may have.

A. Wong Hong and Wong Woo—both at 1588 Geary Street, San Francisco.

Sworn.

(Signed by applicant in Chinese.)

(Signed) CHIN JACK, Int.

(Signed) P. F. MONTGOMERY, Inspr.

10-19-07.

Testimony Before Inspector Montgomery, Dated October 23, 1907.

Chinese Division, Immigration Service,
San Francisco, Oct. 23, 1907.

192—WONG SEE YING.

Class: Native.

Inspector: MONTGOMERY.

Interpreter: YONG KAY.

Steno: R. T. FERGUSON.

Ex. S. S. "Manchuria," Oct. 12.

Witness: WONG HONG PING, Sworn.

Q. What is your name and age?

A. Wong Hong Ping or Wong Yow Chung; 43.

Q. Where were you born?

(Testimony of Wong Hong Ping.)

A. Leung Dung village, Sun Ning district, China.

Q. When did you first come to the U. S.?

A. K. S. 3.

Q. What is your occupation?

A. Merchant of Kwong Yick Wo Co., 1538 Geary St., S. F.

(Recognizes photograph of applicant as that of Wong See Ying.)

Q. Where was he born?

A. Corner Dupont and Commercial Sts., San Francisco, in K. S. 5-5-15 (July 4, 1879).

Q. Where were you living when he was born?

A. Battery St., San Francisco.

Q. Did you know the applicant's family and did you visit them?

A. Yes; his father and I came to the United States together the first time.

Q. Did you visit the applicant's parents at the time the applicant was born?

A. Yes, I went to the family every evening.

Q. How old was the applicant at the time you first saw him?

A. Three days. I saw him at his birth place in his mother's arms.

Q. What was his father's name?

A. Wong Gen Sai or Wong Soon.

Q. What was his father's business here?

A. Working in a laundry for washing new clothes, 600 block Battery St.

Q. How long did he work there?

(Testimony of Wong Hong Ping.)

A. 4 or 5 years.

Q. Where is the father now?

A. He went to China last year, 5th month on the "Siberia" (June July, 1906). He was 61 years old then.

Q. What was he doing at the time he went away?

A. He did nothing after the fire.

Q. Was he sent back by the Chinese Government as a refugee? A. He paid his own way.

Q. What did he do at the time of the fire?

A. I was in China. I don't know.

Q. What was the applicant's mother's name?

A. Chin Shee—bound feet—54 or 55 years old.

Q. Where is the mother?

A. She went to China K. S. 6-9 on the "Peking" (Oct. Nov. 1880).

Q. Who went with her?

A. I was a boy 15 years old—I don't know.

Q. Did this woman have more than one child born to her while she was in this country?

A. No.

Q. Did her husband go to China with her?

A. No.

Q. Did the applicant go to China with her?

A. Yes.

Q. You say the applicant and his mother departed on this trip and the father did not go?

A. Yes.

Q. Has the applicant ever returned to this country until this trip?

(Testimony of Wong Hong Ping.)

A. No, this is his first trip.

Q. What has he been doing in China?

A. Going to school. After he quit school he went to the Sing Chung market and worked in a grocery store.

Q. Why is he coming to the U. S. at the age of 28 years if he is established in business in China?

A. He wanted to come back because he was born here and wanted to go in business here.

(2—192, Wong See Ying. Nat. "Manchuria," Oct. 12-07. Wit. Wong Hong Ping.)

Q. What is the exact relationship between yourself and this applicant?

A. He is the son of my uncle—my father's brother.

Q. What is your father's name?

A. Wong Sai Hawk.

Q. Your father and the applicant's father are brothers? A. Yes.

Q. What is your paternal grandfather's name?

A. Wong Han Git.

Q. Then Wong Han Git is the applicant's grandfather? A. Yes, on his father's side.

Q. What is your paternal grandmother's name?

A. Hom Shee.

Q. What is your mother's name?

A. Pong Shee.

Q. Have you any brothers or sisters?

A. No. My parents died when I was young.

Q. Have you seen the applicant in China?

(Testimony of Wong Hong Ping.)

A. I saw him K. S. 25 in Leung Dung village and also in K. S. 32. He was living with his mother. His father went home last year and they are there now. I also live in that village.

Q. Do you recall the location of the applicant's house? A. 5th alley, 2d house.

Q. How large is that village?

A. Over 50 houses.

Q. What is the nearest market?

A. Wah On, 2 li away.

Q. Are you registered?

(Produces certificate #11311, Wong Pang, laborer, Brooklyn, N. Y., Apr. 16, 1894. Photo of witness.)

Q. Have you anything further to state?

A. No.

Q. Have you understood the interpreter?

A. Yes.

(Signed in Chinese.)

(Signed) P. F. MONTGOMERY.

YONG KAY.

10-24-07.

Chinese Division, Immigration Service,

San Francisco, Oct. 23, 1907.

192—WONG SEE YING.

Class: Native.

Inspector: MONTGOMERY.

Interpreter: YONG KAY.

Steno.: R. T. FERGUSON.

Ex. S. S. "Manchuria," Oct. 12.

Witness: WONG WOO, Sworn.

Q. What is your name?

A. Wong Woo or Wong Sai Kip.

Q. How old are you? A. 50.

Q. Where were you born?

A. China, Wing Sing village, Sun Ning district.

Q. When did you first come to the U. S.?

A. T. G. 11.

Q. What is your occupation?

A. Doing nothing now. I live at Kwoon On Wah Co., 369 8th St., Oakland. Before the fire I was a member of Dung Chung Wing Co., 33 Waverly Pl.

Q. Are you registered?

A. Yes, as a laborer.

Q. For whom have you come to testify?

A. Wong See Ying.

Q. When did you see him last?

A. I went to China K. S. 15-6 on the "China" and returned K. S. 17-7 on the "Gaelic." I saw him then in Leung Dung village. I took money home from the father. I went again K. S. 25-10 on the "Nippon Maru" and returned K. S. 27-5 on the "China."

Q. Would you recognize the applicant if you saw him now? A. Yes.

Q. (Recognizes photo of applicant as Wong See Ying.)

Q. Where was he born?

A. Corner Dupont and Commercial Sts., San Francisco.

Q. When was he born? A. I don't know.

(Testimony of Wong Woo.)

Q. Where were you living at the time he was born? A. 835 Dupont St.

Q. Did you know applicant's family and did you visit them at that time?

A. I knew the father but I did not visit the family.

Q. How old was the applicant the first time you saw him?

A. At the time he started from here to go to China I first saw him and he was one or two years old.

Q. You never saw him until he departed for China at the age of one or two years? A. No.

Q. How did you happen to see him then?

A. He was going down to the wharf with his mother for a trip to China. I went down to see them off.

Q. You went down to the steamer to see the applicant off? A. Yes.

Q. How long had you known his father prior to this time? A. About two years.

Q. You had never seen the applicant before?

A. No.

Q. Are you any relation to the applicant?

A. No relation. I got acquainted with his father because I was a merchant and he ran a laundry and he came to my store for goods.

Q. Did you make a special trip down to the dock to see the applicant off? A. Yes.

Q. Did the applicant have any shaving feast held in this city?

(Testimony of Wong Woo.)

A. I did not know anything about it. If I had known of it I would have seen him then.

Q. Did you ever go down to the dock to see any other people off at this time?

A. Yes; Wong Sai Gow, who is now in Hongkong.

Q. Is there anybody in the U. S. now whom you went down to the dock to see go away?

A. Yes; Wong Sai Fong, who is now in Kwoon On Wah Co.

Q. When did you go down to the dock to see him off? A. Last year, 10th month.

Q. Is it your custom to go down to the dock whenever any of your friends leave this country for China? A. Whenever I have time I go.

(2—192, Wong See Ying. Nat. "Manchuria," Oct. 12-07. Wit. Wong Woo.)

Q. What is the applicant's mother's name?

A. Chin Shee—bound feet. She is in China.

Q. When did she go?

A. K. S. 6-9 on the "Peking."

Q. Is this the time the applicant went with her?

A. Yes.

Q. Did this woman have any other children born to her in this country besides this applicant?

A. No.

Q. What is the applicant's father's name?

A. Wong Gen Sai.

Q. Where is he now?

A. He went to China K. S. 32-5 on the "Siberia" at the age of 60.

(Testimony of Wong Woo.)

Q. What was he doing at that time?

A. He was doing nothing then. Before the fire he was a laundryman in a laundry for washing new clothes, 415 Commercial.

Q. Was this man always a laundryman in this country? A. Yes; ever since I knew him.

Q. Did he have any brothers?

A. An older brother. I don't know his name.

Q. Do you know the man who just testified here?

A. Yes.

Q. Is he any relation to the applicant?

A. He is Wong Gen Sai's nephew.

Q. Have you anything further to state?

A. No.

Q. Have you understood the interpreter?

A. Yes.

(Signed in Chinese.)

(Signed) P. F. MONTGOMERY.
YONG KAY.

10-34-07.

Chinese Division, Immigration Service,

San Francisco, Cal., Oct. 24, '07.

192—WONG SEE YING.

Class: Native.

Inspector: MONTGOMERY.
Interpreter: CHIN JACK.
Steno.: R. T. FERGUSON.
Ex. S. S. "Manchuria," Oct. 12.

Witness: WONG SAI FONG, Sworn.

Q. What is your name?

A. Wong Sai Fong; age, 50.

Q. Where were you born?

A. Leung Dung village, Sun Ning district, China.

Q. When did you first come to the U. S.?

A. K. S. 4.

Q. What is your occupation?

A. Merchant of Kwoon On Wah Co., 369 8th St., Oakland.

Q. For whom have you come to testify?

A. Wong See Ying.

Q. When was the last time you saw him?

A. K. S. 33—1st or 2d month, in China, Leung Dung village, Sun Ning dist.

Q. Where was he born?

A. Corner Dupont and Commercial, third floor.

Q. How old is he now?

A. 29 Chinese, born K. S. 5-5.

(Identifies photograph of applicant.)

Q. Where were you living at the time of his birth?

A. Quong Hong Foon, 835 Dupont St., San Francisco.

Q. Did you visit the applicant's family at all?

A. Yes.

Q. How old was the applicant when you first saw him?

A. One or two months. I saw him in my store in his father's arms.

Q. Did you ever see him in his own home?

(Testimony of Wong Sai Fong.)

A. Sometimes when I delivered goods at the home.

Q. What was his father's name?

A. Wong Gen Sai or Wong Soon.

Q. What did the father do?

A. Wah Sing laundry, 415 Commercial St., for ironing new clothes.

Q. Where is he now?

A. He went to China K. S. 32-5 on the "Siberia." I went down to the mail dock to see him off.

Q. What is the applicant's mother's name?

A. Chin Shee—bound feet—over 50 years old.

Q. Where is the mother?

A. She went to China K. 6. I went to China K. S. 6-7 and I met her in China about two months after.

Q. Did you ever hear what ship she went on?

A. No.

Q. Did this woman have more than one child born to her in the U. S.?

A. No; the applicant is an only son.

Q. Did the applicant have a shaving feast in this city?

A. Yes. I did not attend it, because I had no time.

Q. How did you know there was a shaving feast if you did not attend?

A. I was invited. It was held in the father's room.

Q. When did the applicant go to China?

(Testimony of Wong Sai Fong.)

A. I think KS. 6, with his mother. I saw him in China in the 10th month.

Q. Has the applicant ever returned to the U. S.?

A. Never until now.

Q. What has he been doing in China?

A. He was employed in Guey Lung Co., Sin Chung market place, Sun Ning district, Chinese grocery.

Q. Is he married? A. No.

Q. Why did the applicant wait until he was 28 years old before coming to this country?

A. His mother refused to let him come to this country, and his father ordered him to come back.

Q. And they did not settle this family dispute as to whether the applicant should return to the U. S. until this year? A. No.

Q. What is he coming to this country for?

A. To work.

Q. Are you any relation to the applicant?

A. Clansman only.

Q. How far is your home from the applicant's house in China?

(2—Wong See Ying. Nat. "Manchuria." Oct. 12—07. Wit. Wong Sai Fong.)

A. Two or three blocks.

Q. Did you visit the applicant at his house?

A. Yes.

Q. Who does he live with?

A. His father and mother.

Q. How many houses in your village?

A. Forty or fifty.

(Testimony of Wong Sai Fong.)

Q. Has that village any subdivisions?

A. Yes.

Q. What is the name of your subdivision?

A. Bot Gwar.

Q. How many houses in that?

A. A little over 20.

Q. What is the name of the applicant's subdivision? A. Fung Yee.

Q. How many houses in that? A. 40 or 50.

Q. These two subdivisions together are known by what name? A. Leung Dung.

Q. How many houses in the two villages together—yours and the applicant's?

A. Over 70.

Q. Did the applicant's father have any brothers?

A. One older brother; Wong Sai Hawk. He is dead.

Q. Did Wong Sai Hawk have any children?

A. One boy, Wong Hong Ping. He is in San Francisco.

Q. Where was he born? A. China.

Q. What is his mother's name?

A. Tom Shee, to the best of my knowledge. I am not sure.

Q. In what house and alley did the applicant live in China? A. 2d house, 5th alley.

Q. What is the nearest market?

A. Wah On, 2 li away.

Q. Have you anything further to state?

A. No.

Q. Have you understood the interpreter?

A. Yes.

(Signed in Chinese)

(Signed) P. F. MONTGOMERY.

CHIN JACK.

10—24—07

Memorandum for Mr. Mehan, Dated October 25, 1907, from P. F. Montgomery.

IMMIGRATION SERVICE.

OFFICE OF THE COMMISSIONER.

San Francisco, Cal., Oct. 25, 1907.

MEMORANDUM FOR MR. MEHAN (Stidger & Stidger, Attys.)

In re Wong See Ying, native, No. 192, ex. S/S "Manchuria, Oct. 12, 1907, I have to state as follows:

In compliance with your instructions I have to state that I cannot proceed further with the above case until the photograph of witnesses Wong Hong and Wong Si Fon are furnished this office.

Respectfully,

P. F. MONTGOMERY,

Chinese Inspector.

M/

Affidavit of Wong Hong and Wong Si Fon.

Photograph of Wong Hong Sing.

Attached Oct. 28/07.

P. F. Montgomery, Chinese Inspector.

State of California.

The undersigned, being sworn, say, each for himself, and not one for the other, that his name and

address is as undersigned; that he identifies the photograph attached hereunto as a true likeness of himself; that he identifies the applicant, Wong See Ying, an applicant, No. 192 S. S. "Manchuria," as a native-born citizen of the United States, he having been born in the City and County of San Francisco, State of California, and having departed therefrom many years ago; that your affiant has seen the said native in China and identifies him as aforesaid.

Names:	Address:
Wong Hong.....	1538 Geary St., S. F.
Wong Si Fon.....	369 — 8th St., Oakland.

Subscribed and sworn to before me this 23 day of October, 1907.

[Seal] CHARLES D. O'CONNOR,
Notary Public.

Affidavit of Wong Hong and Wong Si Fon.

Photograph of Wong Si Fon.

Attached Oct. 28/07.

P. F. Montgomery, Inspector.

State of California.

The undersigned, being sworn, say, each for himself, and not one for the other, that his name and address is as undersigned; that he identifies the photograph attached hereunto as a true likeness of himself; that he identifies the applicant, Wong See Ying, an applicant No. 192 S. S. "Manchuria," as a native-born citizen of the United States, he having been born in the City and County of San Francisco, State of California, and having departed therefrom many

years ago; that your affiant has seen the said native in China, and identifies him as aforesaid.

Names:	Address:
Wong Hong.....	1538 Geary St., S. F.
Wong Si Fon.....	369 — 8th St., Oakland.

Subscribed and sworn to before me this 23 day of October, 1907.

[Seal] CHARLES D. O'CONNOR,
Notary Public.

Testimony Before Inspector Montgomery, Dated November 12, 1907.

Chinese Division, Immigration Service,

San Francisco, November 12, 1907.

#193—WONG SEE YING.

Class: Native.

Inspector: P. F. MONTGOMERY.

Interpreter: YONG KAY.

Stenographer: ANNA OSSWALD.

Ex S. S. "Manchuria," Oct. 12, 1907.

APPLICANT.

Q. What is your name?

A. Wong See Ying.

Q. How old are you? A. 28.

Q. When were you born? A. K. S. 5-5-15.

Q. Where?

A. Spanish Building, San Francisco. My mother didn't tell me the name of the street. She only said near Commercial street.

Q. Don't you know the location of the place in which you were born?

(Testimony of Wong See Ying.)

A. My mother told me it was in the Spanish Building.

Q. How long did you live at that number after you were born?

A. Until I went to China when I was 2 years old.

Q. What is your father's name?

A. Wong Han Si.

Q. What other name did he have?

A. Wong Soon is his birth name.

Q. What is his business in this country?

A. Tailor, making new clothes with the sewing-machine.

Q. Where was the tailoring establishment located? A. He didn't tell me.

Q. Where is your father now?

A. He went to China the 6th month of last year (July or August, 1906).

Q. How old was your father when he went away?

A. 61. He is 62 now.

Q. Where was he living at the time he went away?

A. I don't know. My father didn't tell me.

Q. Do you know what boat he went on?

A. I don't know; he didn't tell me.

Q. What was your mother's name?

A. Chin Shee.

Q. What kind of feet did she have?

A. Bound feet.

Q. How old is she now? A. 55.

Q. Where is she? A. In China.

Q. When did she go to China?

(Testimony of Wong See Ying.)

A. She went to China with me when I was 2 years old.

Q. What year, month and day was it?

A. K. S. 6-9-17, on the "Peking" (October 20, 1880.)

Q. How do you know it was the "Peking"?

A. My mother told me.

Q. Do you have any brothers or sisters?

A. No.

Q. What have you been doing in China?

A. I was porter in the Guey Sin store at Sun Chong Fow.

Q. Were you engaged up to the time you started for this country?

A. Yes, I started soon after resigning from work.

Q. Are you married? A. No.

("Manchuria," Oct. 12, 1907. Applicant.—2—)

Q. Why have you waited until you were 28 years old to come back to the United States if you were born in this country?

A. Several years ago I wrote to my father about coming back to this country, and he told me not to come so soon, and therefore I waited until this date.

Q. Why did he tell you not to come so soon; what reason did he assign?

A. He didn't give any reason, though he stated that there was no hurry about my coming.

Q. Can you write a letter? A. Yes.

Q. Did you write the letter to your father yourself, asking if you could come to this country?

(Testimony of Wong See Ying.)

A. Yes, wrote it myself.

(Applicant is shown Chinese writing and read same.)

Q. Is there anybody in this country at the present time who knows that you were born here?

A. I don't know. I remember that there is one Wong Sai Fong by name, several years ago, when he returned to China, and my father sent some money by him to our family, but I don't know where he is now.

Q. Do you remember testifying before me on the steamer? A. I could not remember.

Q. Is that your signature? (Showing signature of applicant on statement made on October 16, 1907.)

A. Yes, that is my signature.

Q. You did testify before me on the steamer?

A. I was afraid to lift up my head and look at you, and if I did perhaps I could recognize you.

Q. Why were you afraid to lift your head up?

A. I was examined but a few words when I went in and bowed my head, and I didn't lift my head.

Q. Why were you afraid?

A. I made a mistake by saying I was afraid.

Q. Then you were not afraid and nobody has frightened you?

A. No, I was not afraid. I made a mistake.

Q. Do you remember me now?

A. Yes, I can recognize you now.

Q. I asked who your witnesses were, and you gave me the names of three people. What were the names of the three people?

(Testimony of Wong See Ying.)

A. Wong Ping, Wong Hong, Wong Woo.

Q. Has Wong Sai Fong appeared at this office and testified in this case? A. I don't know.

Q. How do you happen to mention Wong Sai Fong now if you did not mention him on the steamer?

A. Because I was not asked.

Q. Did you know about Wong Sai Fong at the time I asked you? A. Yes.

Q. You were asked (reading from original statement of applicant October 16, on board "Manchuria"), "Give me the name and address of any witness you may have," and you replied, "Wong Hong and Wong Woo—both 1588 Geary St., San Francisco." Do you know a Chinese person by the name of Wong Hong Ping?

A. Yes, he is a clansman of mine.

Q. What is his exact relation to you?

A. His father and my father are brothers.

Q. What is his father's name?

A. Wong Si Hawk.

Q. What is your paternal grandfather's name?

A. Wong Han Git.

(192, "Manchuria," Oct. 12, 1907. Applicant—3—)

Q. What is your paternal grandmother's name?

A. Hom Shee.

Q. What is the name of Wong Hon Ping's mother? A. Pong Shee.

Q. Has Wong Hong Ping got any brothers or sisters? A. No.

Q. Are his parents living?

(Testimony of Wong See Ying.)

A. They died long ago. I have never seen them.

Q. Have you seen Wong Hong Ping in China?

A. Yes.

Q. Where does he live? A. In our village.

Q. What is the name of the village?

A. Fung Yee village. The same village has several names, new village Sin Tun and Sun Chuey village.

Q. Are you positive now that that village has no other name? A. I am positive.

Q. Did you ever hear of the Leung Dung village?

A. No.

Q. Never heard of that village? A. No.

Q. How do you account for the fact that Wong Hong Ping says you live in that village with your mother?

A. That is a general name of that place.

Q. Did you ever hear this name before?

A. That name has always been known to me.

Q. Why didn't you give it, then, when I asked you? A. I did state it.

Q. Does that name refer to the particular village in which you live or to the locality?

A. The locality.

Q. How large is the village in which you live?

A. 40 or 50 houses.

Q. What house and what alley do you live in?

A. 5th alley, 2d house.

Q. Is there a market-place in that village?

A. Wah On Market 3 or 4 lis from there.

(Testimony of Wong See Ying.)

Q. When was the last time you saw Wong Hong Ping?

A. The first part of the 12th month, last year, in our house.

Q. Did you see him before that?

A. Yes, at the time when he came home from abroad. I could not remember when it was, it has been so long.

Q. About when was it?

A. I didn't keep his trip to China in my mind.

Q. Whose photograph is that?

A. Wong Hong Ping.

(Correctly identifies photograph.)

Q. Who is that? (Showing photograph of Wong Sai Fong.) A. Wong Sai Fong.

Q. Have you ever seen Wong Woo?

A. I saw him about K. S. 15 or 16.

Q. Where did you see him?

A. In our house when he returned to China and delivered some money to our family from my father.

Q. What village was that?

A. Fung Lee village. Wing Sing is Wong Woo's village.

Q. Why are you coming to the United States now?

A. Because my father came home to China last year and he asked me to come.

(193 Manchuria, Oct. 12, 1907. Applicant.—3—)

Q. What are you going to do? What did he ask you to come for?

(Testimony of Wong See Ying.)

A. Learning mercantile business.

Q. With whom?

A. I don't know yet until I land and see Hong Ping about it.

Q. Does your father intend to return to the United States?

A. I don't know about that. He is over 60 years old now.

Sworn.

(Applicant signed in Chinese characters.)

(Signed) YONG KAY,
Interpreter.

(Signed) MONTGOMERY,
Inspector.

Transcribed November 12, 1907.

Report Dated November 13, 1907, from P. Frank Montgomery, Chinese Inspector to Inspector in Charge.

DEPARTMENT OF COMMERCE AND LABOR,
IMMIGRATION SERVICE.

Office of Chinese Inspector,

San Francisco, Cal., November 13, 1907.

Inspector in Charge, Chinese Division, Immigration Service, San Francisco, California.

Sir: In re Wong See Ying, Native, 192, Ex-S.S. "Manchuria," October 12, 1907, I have to report as follows:

The statement of the applicant and two Chinese witnesses has been taken. The testimony is briefly as follows:

Applicant states (pages 12, 13, 14 and 15 of the record) that his name is Wong See Ying; that he is 28 years of age; that he was born K.S. 5-5-15 (July 4, 1879) in the Spanish Building; that he does not know what street it is on; that he heard it was near Commercial Street; that he went to China when he was 2 years old; that his father's name is Wong Han Si, alias Wong Soon; that his father was a tailor "making new clothes on a sewing-machine"; that he does not know where the tailoring establishment was located; that his father went to China in July or August of last year at the age of 61; that he does not know what boat he went on; that his mother's name is Chin Shee; that she has bound feet; that she is 55 years of age; that his mother went to China October 20, 1880, on the "Peking"; that he has no brothers and sisters; that he has been working in a store at Sung Chong Fow; that he is not married; that he can assign no particular reason for his not coming to this country until he was 28 years old; that he knows Wong Sai Fong, who saw him in China; that Wong Ping, Wong Hong and Wong Woo also know him; that Wong Hong Ping is a clansman of his and that their fathers are brothers. Note: The balance of statement is cross-examination on the foregoing.

Witness Wong Hong Ping states that he is 43 years of age; a native of China; first came to the United States in K.S.3; that he is a merchant, and that he recognizes photograph of applicant; that he knows that applicant was born in this country, because he visited applicant's family every evening;

that he first saw the applicant when he was three days old; that the applicant's father's name is Wong Gan Si, alias Wong Soon; that said alleged father was

(192 Manchuria, Oct. 12, 1907—2—)

employed in a new clothing laundry in the 600 block on Battery Street; that he worked there four or five years; that alleged father went to China last year at the age of 61 in June or July on the "Siberia": that applicant's mother's name is Chin Shee; that she has bound feet; that she is 54 years of age; that she went to China in K.S. 6-9 (October or November, 1880) on the "Peking"; that applicant had no brothers and sisters born in this country; that applicant went to China with his mother; that applicant went to school in China and afterwards worked in a grocery store; that he is applicant's cousin; that his father and applicant's father are brothers; that he is (witness) registered and produces certificate No. 11311.

Witness Wong Woo states that he is 50 years of age; a native of China; first came to the United States T. G. 11; that he has no employment at the present time; that he has been a laborer; that he recognizes the photograph of the applicant; that he last saw the applicant in China in K. S. 27; that applicant was born at the corner of Dupont and Commercial Streets, San Francisco; that he does not know when applicant was born; that the applicant was 2 years old when he first saw him, at which time he departed for China with his mother; that witness went down to the wharf to see them off; that the applicant had no brothers or sisters born in this country; that ap-

plicant's mother was named Chin Shee; that she had bound feet; that she went to China in K. S. 6—9 on the "Peking"; that applicant's father went to China on the "Siberia" in the 5th month of last year; that applicant's father had an older brother, and that this older brother is the father of witness Wong Hong Ping.

This is a "raw" native case. Applicant went to China, according to his claim, at the age of two years in 1880, and consequently knows nothing about this country. There are no records for the year 1880, as will be seen by page 17 of the record. The departure of the father (alleged) for China on the "Siberia" in July of last year is not verified by our records. A similar name appears on the record, but in the absence of any photograph of the party departing or any means of identification of such person, it is difficult, and in fact impossible, to give such evidence any weight. The testimony contains several contradictions, one of the principal of which is the reference to the occupation of the applicant's father in this country. The father, according to the witnesses, was employed

(192, "Manchuria," Oct. 12, 1907—3—)

as a laundryman in a new clothes laundry, and the applicant evidently got mixed up on his story for he stated (see page 12 of the record) that he was a tailor, making new clothes with a sewing-machine.

In view of the foregoing, and without going any further into this case, I recommend that the applicant be denied, on the ground that he has produced no evidence except his own statement that he was

born in this country. As he is 28 years of age and was engaged at manual labor in his own country until he decided to come here, this is an additional fact in his disfavor.

Respectfully,
P. FRANK MONTGOMERY,
Chinese Inspector.

AMO.

Additional Statement of Wong Sai Fon.

Chinese Division, Immigration Servvice,
San Francisco, Nov. 15, 1907.

192—WONG SEE YING.
Class: Native.
Inspector: MONTGOMERY.
Interpreter: J. H. GUBBINS.
Steno.: R. T. FERGUSON.
Ex. S. S. "Manchuria, Oct. 12, 1907.

Additional Statement of WONG SAI FONG—sworn.

Q. What is your name?

A. Wong Sai Fong.

(Witness presents certificate of residence #90,939, issued to Wong King; person other than laborer; residence, 203 Ferguson alley, Los Angeles, Cal.; occupation, grocer; age, 37; issued Apr. 3, 1894, at Los Angeles, signed O. M. Welborn, per Clyde, First District, California. The photograph thereon is a likeness of the witness.)

Q. How many times have you been to China?

A. Four times: first trip K. S. 6-8—I don't remember the steamer—returning K. S. 7-3 on the

"Peking," under the name Wong King; occupation at that time, porter in the store of Quong Hong Fung Co., 835 Dupont St., San Francisco.

Q. How old were you in K. S. 6?

A. I don't remember. I am 50 now.

Q. When was your second trip?

A. K. S. 15-10 on the "Arabic," returning K. S. 16-9 on either the "Gaelic" or the "Doric," under the name Wong King, merchant of Doo Woon Lee Co., Los Angeles, Ferguson alley. The numbers have changed since. It was then known as "Nigger Alley"—the name has been changed; next trip: K. S. 22-10—I think on the "Doric"—returning K. S. 23-6 on the "Gaelic," under the name Wong King, as a merchant of Yuen Wo Co., 203 Ferguson alley; next trip K. S. 32-10-6 on the "Korea," returning K. S. 33-6 latter part of the month on the "Mongolia," under the name Wong Sai Fong, merchant of Kwoon On Wo Co., 369 8th St., Oakland.

(Signed in Chinese.)

(Signed) P. F. MONTGOMERY.
J. H. GUBBINS.

11-16-07.

Memorandum Relative to Wong Woo.

Chinese Division, Immigration Service,

San Francisco, Nov. 15, 1907.

192—WONG SEE YING.
Class: Native.
Inspector: MONTGOMERY.
Steno.: R. T. FERGUSON.
Ex. S. S. "Manchuria," Oct. 12, '07.

Memorandum.

WONG WOO—Certificate of Residence.

This witness failed to appear, but sent to this office, through the attorney in the case, his certificate of residence:

No. 38456, issued to Wong Woo; laborer; occupation, cook; residence, 203 Ferguson alley, Los Angeles. Date of issue, Mar. 1, 1894, at Los Angeles. Signed, O. M. Wellborn, per N. M. Quirolo, first district of California. Photograph thereon is a likeness of the person who testified at this office Oct. 23, under the name of Wong Woo.

(Signed) P. F. MONTGOMERY.

11-16-07.

Additional Statement of Wong Hong Ping.

Chinese Division, Immigration Service,

San Francisco, Nov. 15, 1907.

192—WONG SEE YING.

Class: Native.

Inspector: MONTGOMERY.

Interpreter: J. H. GUBBINS.

Steno.: R. T. FERGUSON.

Ex. S. S. "Manchuria," Oct. 12, 1907.

Additional Statement of WONG HONG PING—sworn.

Q. What is your name?

A. Wong Hong Ping.

Q. Have you certificate of registration?

A. Yes.

(Produces certificate No. 11311, issued to Wong Pang; laborer; residence, 211 S. 5th St., Brooklyn,

(Testimony of Wong Hong Ping.)

N. Y.; occupation, laundryman; date of issue, Apr. 16, 1894, at Brooklyn, N. Y. Signed, Ernst Nathan, first district of New York. The photograph thereon is a likeness of the witness.)

Q. How many times have you been to China?

A. Two times; first trip K. S. 30-7 on an "Empress" steamer from Vancouver, via Richford, Vt.

Q. What was your occupation at that time?

A. Laundryman, in Boston.

Q. When did you return?

A. K. S. 31-5 or 6 month via Vancouver on an "Empress" steamer, under the name Wong Ping.

Q. Where did you enter the U. S.?

A. Richford.

Q. Did you not state to me October 23, that you saw the applicant in China in K. S. 25?

A. No.

Q. When did you go to China the next time?

A. K. S. 32-2-27 on the "Korea," returning K. S. 33-1-24 on the "Mongolia" as a laborer of Boston, under the name Wong Ping.

(Changes.) I wish to change my statement about my first trip; I went to China the first time K. S. 27-7 on an "Empress" steamer via Vancouver and returned K. S. 26-6 on an "Empress" steamer via Vancouver, the port of entry into this country being Richford, under the name Wong Ping, laborer, of Boston. I did not make any trip in K. S. 30. My first statement is not right and I did not remember correctly.

Q. Are you positive that these are the only trips you have made to China—K. S. 25 and K. S. 32?

A. Yes.

(Signed in Chinese.)
(Signed) P. F. MONTGOMERY.
J. H. GUBBINS.

11-16-06.

Supplemental Report of P. Frank Montgomery, Chinese Inspector, to Inspector in Charge, Dated November 21, 1907.

DEPARTMENT OF COMMERCE AND LABOR,
IMMIGRATION SERVICE.

Office of the Commissioner,

San Francisco, Cal., November 21, 1907.

Inspector in Charge, Chinese Division, San Francisco, Cal.

Sir: In re Wong See Ying, native, #192, ex. S. S. "Manchuria," October 12, 1907, and supplemental to my report of November 13, I have to state as follows:

This case was returned to me with verbal instructions to verify the trips of witnesses to China, which bore on the case, to obtain the numbers of the certificates of residence and to obtain the photographs of the several witnesses. With regard to the foregoing I have to state: The first trip of the witness, Wong King, alias Wong Sai Fon, cannot be verified because the records do not cover the date for this trip, to wit, 1880-81 (see p. 25 of the record). The second trip of witness, Wong King, is verified by the records (p. 25 of the record). The third trip

of witness, Wong King, is verified by the records (see p. 26 of the record). The fourth trip of this witness was made under the name Wong Sai Fon, and is verified by the records (see p. 26 of the record). With regard to the trips of witness, Wong Woo, the records verify his first trip and his second trip (see p. 27 of the record). With regard to the trips of the witness, Wong Hong Ping, the records verify the second trip of this witness (see p. 27 and 28 of the record).

(2 Wong See Ying. 192 Nat. Nov. 21-07.)

The first trip of this witness was made from Vancouver via Richford, Vt., and cannot be verified by the records at this office. This trip was made, according to the witness, in August or September, 1899, on an "Empress" steamer. The return from said trip was made via Vancouver in June or July, 1900.

The certificate of residence of the several witnesses in the case are referred to in detail on pages 19, 20 and 21 of the record, as I have examined same and entered a transcript of the face of each in the record.

With regard to the photographs of the several witnesses: The photograph of witness, Wong Sai Fon, has been obtained and attached to the affidavit of Wong Sai Fon on page 10 of the record. The photograph of witness, Wong Hong Ping, has been obtained and attached to the affidavit of Wong Hong Ping on page 11 of the record. A pencil memorandum attached to page 1 of the record and marked "1 A," shows that the attorney in the case was requested on the 15th instant to produce a photograph of witness, Wong Woo. This has not been done and I am

turning in the case in compliance with my instructions with the memorandum referred to covering this point.

Respectfully,

P. FRANK MONTGOMERY,

Chinese Inspector.

RTF.

Letter Dated November 26, 1907, from Charles Mehan, Chinese Inspector in Charge, to Commissioner of Immigration.

DEPARTMENT OF COMMERCE AND LABOR,
IMMIGRATION SERVICE.
Office of the Commissioner,

San Francisco, Cal., Nov. 26, 1907.

Commissioner of Immigration, San Francisco, Cal.

Sir: Herewith I hand you with my recommendation of denial the record in the case of Wong See Ying, an alleged native, No. 192 ex. S. S. "Manchuria," October 12, 1907.

Respectfully,

CHARLES MEHAN,

Chinese Inspector in Charge.

J. E. G.

CT.

Enc.

Supplemental Report of Chinese Inspector in Charge, Dated November 26, 1907.

DEPARTMENT OF COMMERCE AND LABOR,
IMMIGRATION SERVICE.

Office of the Commissioner,

San Francisco, Cal., November 26, 1907.

Inspector in Charge, Chinese Division, Immigration Service, San Francisco, California.

Sir: In re Wong See Wing, Native, No. 192 ex. S. S. "Manchuria," October 12, 1907, and supplemental to my report of the 13th instant, I have to state as follows:

I beg to acknowledge receipt of your verbal correction of my report of the 13th instant with regard to my not having adverted to the testimony of but two witnesses, whereas I should have stated the fact in the case that three witnesses had been taken. The witnesses to whom I referred were Wong Hong Ping and Wong Woo. Their statements, together with that of the applicant, were alluded to and briefed in the usual form. I omitted, through a clerical error, owing, no doubt, to the volume of work I was handling at the time, to refer to the testimony of witness, Wong Sai Fong, who testified at this office on October the 24th, and whose testimony appears upon pages 8 and 9 of the record. In my report of the 21st instant, however, I carefully went over the testimony of this witness, as will be seen by a reference to pages 29a and 29b, the particular point of this witness' testimony being whether or not he had seen the

applicant in China at certain times stated by himself.

(192. "Manchuria," Oct. 12, 1907.)

2.

A brief résumé of the testimony of Wong Sai Fong is as follows:

Witness Wong Sai Fong states (pages 8 and 9 of the record), that he is 50 years of age, a native of China, and that he first came to the United States in K. S. 4; that he is a merchant of Oakland at the present time and that he appears to testify for the applicant, Wong See Wing, whom he last saw in China K. S. 33, 1st or 2d month (February, March *of* April, current year), and whose photograph he identifies; that he knew the family of the applicant and visited them; that he saw the applicant first at the age of 1 or 2 months in his (witness') store in applicant's father's arms; that he also saw him upon the occasion of delivering goods at the home of applicant's father; that applicant's father was named Wong Gen Sai alias Wong Soon; that applicant's father was engaged at 415 Commercial Street as an ironer of new clothes in the Wah Sing laundry, that said alleged father went to China K. S. 32-5 on the "Siberia" (June-July, 1906), and he knows this fact for he went to the dock to see him depart; that applicant's alleged mother was known as Chin Shee; that she was a bound-footed woman and is now over 50 years of age; that she departed for China in K. S. 6 (1880); that he saw her in China in the 10th month of that year (November-December, 1880); that the applicant was the only child born to this

woman in this country; that he did not attend the shaving feast of the applicant because he did not have time to do so; that applicant was employed in China in the firm of Guey Lung & Co., Sin Chung market place, Sun Ning District; that applicant is not married; that applicant is 29 years of age according to Chinese reckoning, having been born in the 5th month of K. S. 5 (June-July, 1879); that applicant was refused permission to come to this country by his mother, but that his father overruled his mother and insisted on his coming; that applicant is coming to this country for the purpose of securing work; that he is a clansman and no nearer relation to the applicant; that he lives in the same village in China as the applicant, or more particularly, in the Bot Gwar subdivision of the Leung Dung village, Sun Ning District; that the applicant's father had an older brother named Wong Sai Hawk, who is now dead; that said Wong Sai Hawk has one son named Wong Hong Ping, who is at the present time in San Francisco; that said Wong Hong Ping's mother's name was Tom Shee to the best of witness' knowledge; that the applicant lived in the 2d house in the 5th alley of the Leung Dung village in China; that the market-place in this village is known as the Wag On, which is 2 lis away.

Regretting that even the pressure of work should have caused an oversight of this character, I here-

with transmit the above, as it will, I believe, leave the record complete.

Respectfully,

P. FRANK MONTGOMERY,
Chinese Inspector.

AMO.

Letter, Dated November 27, 1907, from H. H. North to Chinese Inspector in Charge.

DEPARTMENT OF COMMERCE AND LABOR,
IMMIGRATION SERVICE.

5265-C.

Office of the Commissioner,

San Francisco, Cal., Nov. 27, 1907.

Chinese Inspector in Charge, San Francisco.

Sir: Herewith please find record in re Wong See Ying, an alleged native, No. 192, ex. S. S. "Manchuria," Oct. 12, 1907, bearing your recommendation of denial of the 26th instant, on which date it was necessary to send the record back in order that Insp. Montgomery should properly be informed of his duties, he having omitted entirely from his report the testimony of one of the witnesses.

In his corrected report on pages 31 and 32 of the record, he attempts to justify this carelessness on the ground of pressure of overwork, etc. I wish you to give him to understand that in doing his work he will be required at all times to do it properly and that the excuses he offers will not be accepted.

It is also noted that the case had to be sent back for re-examination as he failed to inquire of two of the witnesses the numbers of their certificates of resi-

dence, which he had omitted to procure in the original examination; this is also carelessness which will not be excused in the future.

As to this case, the applicant is what we call a "raw native," that is, he claims to be 28 years of age; to have been born in the notorious Spanish Building, this city, in 1879, and at the age of one year, or in 1880, to have departed for China with his mother, where he has since resided. This departure, of course, is before the beginning of our records. He picks out for a father a Chinese laborer who left this port for home about a year since; he offers in his own behalf the testimony of 3 Chinese witnesses. It is of the ordinary character in applications of this sort. By going over our files, hundreds, and probably even thousands, of records may be found wherein the testimony would not vary in any material particular, and thousands of like raw natives have claimed the Spanish Building as a birth place.

The evidence is wholly unconvincing, and I believe that I am neither arbitrary nor unfair in rejecting it entirely. Personally, I feel that the evidence does not prove in any respect that this applicant was ever here before, much less that he is a native.

Under the circumstances, there is nothing for me to do but to order a denial of the application, which is consequently hereby done. You will of course acquaint him with his right to appeal, etc.

Respectfully,

H. H. NORTH,
Commissioner.

ML.

Dismissal of Appeal of Wong See Ying, Before Bureau of Immigration.

DEPARTMENT OF COMMERCE AND LABOR,
BUREAU OF IMMIGRATION.

Washington, January 17th, 1908.

#14,610/353-C.

Immigration Service, San Francisco, Cal.

Appeal Wong See Ying dismissed.

MURRAY.

Attest: (Signed) LAWRENCE O. MURRAY,
Assistant Secretary.

4 Inclosures #6157:

Affidavit Wong Hong and Wong Woo.
2 " " " and Wong Si Fon.
Picture Wong Woo.

Memorandum for Acting Secretary (Department of Commerce and Labor).

DEPARTMENT OF COMMERCE AND LABOR.
No. 14,610-C 1353. Dec. 28, 1907.

In re WONG SEE YING—Alleged Native.

Memo. for the Acting Secretary:

It is claimed that the appellant was born in San Francisco, K. S. 5-5 (July 4, 1879); was taken to China by his mother K. S. 6-9, where he has since resided; and that his father remained here until last year.

As records of departures were not kept in 1880, the departure of mother and son cannot be verified or dis-

proved. It is the practice in a great majority of cases of this character to account for the mother in this way. There is a record of the departure of a man who is claimed as the father. It is the opinion of the Bureau that this man has been selected for the occasion, and that he is not the father of appellant, this conclusion being reached after reading the testimony of appellant. He states that his information about his birth was given him by his mother, although his father only returned to China a year ago and would unquestionably be better qualified to tell him about San Francisco. Furthermore, he knows absolutely nothing about his father's life in this country except that he was a "tailor, making new clothes with the sewing-machine," while the witnesses testify that he was a laundryman in a new clothes laundry. It is not reasonable to suppose that if the father had returned to his home from a foreign country that he would not have told his family of his life.

The applicant is coming to his cousin who hails from the same village in China from which he only returned a few months ago. It is more than likely that the case was concocted at that time. This witness, Wong Hong Ping, although only 13 years older than appellant, claims to have been living in San Francisco for two years prior to the alleged birth; to have seen the baby when it was only 3 days old in its mother's arms, etc. It is hardly probable that a boy 10 or 11 years old would have come to this country without his family, and in support of this presumption the records of this office show that at the time of registration this man swore that he first ar-

rived in July, 1880, or only about three months prior to the time it is claimed that appellant was taken to China. As there was no reason at that time to misstate facts and his memory 13 years ago must have been as reliable as to-day, the necessary conclusion is that the man is falsely testifying.

The testimony of the witness Wong Woo is about on a par with that of the first witness. For instance, he testifies that he knew the father but never visited him and did not know the mother and never saw the baby until they were on the way to the wharf, and notwithstanding this he states that he went to the wharf to see them off. It is most unlikely that a merchant would leave his store to go to see the wife and baby of a laundryman who were strangers to him, off.

In the opinion of the Bureau this case is undoubtedly fraudulent, in view of which it is recommended that the appeal be dismissed.

F. P. SARGENT,
Commissioner General.

Jan.16. '08.

Del. d.

L. O. M.

[Endorsed]: Filed March 3, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, Northern, District of California.

No. 13,751.

In the Matter of WONG SEE YING on Habeas Corpus.

Opinion of District Court.

DeHAVEN, District Judge.—I am not able to find from the evidence that H. H. North, the Commissioner of Immigration at the port of San Francisco, failed to give to the said Wong See Ying when he applied to be permitted to land at San Francisco, upon coming into that port from the Empire of China, such a hearing, as he was entitled to under the law, as declared in U. S. vs. Ju Toy, 198, U. S. 253, and the more recent case of Chin Yow vs. the United States; or that in denying the right of said Wong See Ying to land at the port of San Francisco, said H. H. North acted arbitrarily or unreasonably.

The only fact which has the tendency to sustain the allegations of the petition upon this point is that the Immigration Commissioner did not accept, as true, the sworn statements of witnesses in behalf of Wong See Yin's right to land. But under the ruling in the case of Chin Yow vs. the United States above cited, this is not sufficient upon which to base a finding that the applicant was denied a fair hearing by the Commissioner of Immigration.

For these reasons, the writ will be discharged and the said Wong See Ying remanded to the custody whence he was taken.

So ordered.

[Endorsed]: Filed Febry. 28, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

In the Matter of WONG SEE YING, on Habeas Corpus.

Petition on Appeal.

To the Honorable JOHN J. De HAVEN, Judge of the District Court of the United States, in and for the Northern District of California.

Wong See Ying, feeling himself aggrieved by the order and judgment of this Court, made and entered on this 28th day of Feburary, A. D. 1908, remanding Wong See Ying to the custody from whence he came, does hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from said order, judgment and decree, and from each and every part thereof; and *that he* prays that this petition for his said appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment and order was made and entered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit. And petitioner further prays that the custody of said Wong See Ying be not disturbed or changed during the pendency of this appeal unless by order of this Court or of the Appellate Court.

Dated the 3d day of March, A. D. 1908.

JOHN C. CATLIN,
Attorney for Petitioner.

STIDGER & STIDGER,
Of Counsel.

[Endorsed]: Filed in open Court March 7, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

In the Matter of WONG SEE YING on Habeas Corpus.

Assignment of Errors.

Now comes Wong See Ying and files the following assignment of errors upon which he will rely on his appeal this day taken from the order and judgment made and entered by this Court on February 28th, 1908, remanding Wong See Ying to the custody from which he came

I.

That the said District Court erred in this, to wit, that it appears from the papers and pleadings, evidence, proofs and files herein, that the said Wong See Ying was ordered returned to China by the Commissioner of Immigration for the Northern District of California without the hearing contemplated by law; that said District Court of the United States wrongfully refused to hear and consider the application of said Wong See Ying, and his right to be and remain in the United States of America because a native-born citizen thereof; that the said Commissioner of Immigration aforesaid acted without jurisdiction, and the District Court of the United States erred in refusing to entertain jurisdiction of said matter, and to hear and consider, determine and de-

cree the right of said Wong See Ying to enter, be, and remain in the United States as a citizen *of* thereof; and that the said order, judgment and decree remanding said Wong See Ying to the custody from whence he was taken did deprive said Wong See Ying of his personal liberty without due process of law.

II.

That the said District Court erred in refusing to hear or consider the offer on behalf of said Wong See Ying, made at the hearing before said District Court to establish the right of the said Wong See Ying to be and remain in the United States, as a citizen thereof, of the testimony of seven witnesses, to the effect that said Wong See Ying was born in the United States, and was a citizen thereof, and in rejecting said offer of said Wong See Ying to make said proof at said hearing, the said Wong See Ying was deprived of his personal liberty and of his right to land in the United States without due process of law.

III.

That the District Court erred in holding that said Commissioner of Immigration for the Northern District of California, and the Department of Commerce and Labor, did allow and give the said Wong See Ying a fair hearing in good faith as to his right to enter, be and remain in the United States as a citizen thereof.

JOHN C. CATLIN,
Attorney for Petitioner.

STIDGER & STIDGER,
Of Counsel.

[Endorsed]: Filed in open court Mch. 7, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

No. ———.

In the Matter of WONG SEE YING on Habeas Corpus.

Order Allowing Appeal, etc.

Wong See Ying, having presented to this Court in open session, on this 7th day of March, A. D. 1908, his petition on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the judgment, order, and decree made and entered by this Court on the 28th day of February, A. D. 1908, remanding Wong See Ying to the custody from whence he came, and having presented to the Court at the same time an assignment of errors, and having by his counsel moved the Court for an order allowing said appeal and staying proceedings during the pendency of said appeal—

It is hereby ordered that the said appeal be and the same is hereby allowed; and further, that a certified transcript of all the record and all proceedings be prepared and transmitted by the Clerk of this Court to the United States Circuit Court of Appeals for the Ninth Circuit, in the time prescribed by law.

And it is further ordered that the custody of the said Wong See Ying be not disturbed or changed unless by order of this Court or the Appellate Court.

Done in open court this 7th day of March, A. D. 1908.

JOHN J. DeHAVEN,
Judge.

[Endorsed]: Filed Mar. 7, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

No. 13,751.

In the Matter of WOONG SEE YING, on Habeas Corpus.

Traverse to Answer and Return of H. H. North, Commissioner of Immigration, to Writ of Habeas Corpus.

Now comes the petitioner in the above-entitled matter and traverses the answer and return of H. H. North, Commissioner of Immigration, to order to show cause issued herein.

I.

Traversing the first paragraph, denies that the petition for writ of habeas corpus herein fails to state any fact or facts from which it can be determined that the applicant for said *writ, to wit*, the said Wong See King (Ying).

II.

Traversing the second paragraph denies that said Wong See King (Ying) is an alien Chinese person, and a native of the Empire of China, and that he has no right to enter or land in the United States; but, on the contrary, avers that said Wong See King

(Ying) was born in San Francisco, California, in 1879, and thereafter departed with his mother for the "Empire" of China, and has never renounced or abjured his citizenship and allegiance to the United States, and now returns to and claims the right to enter the United States as a citizen thereof. Further traversing that part of the 2d paragraph alleging "That then and there, to wit, in said October 16th, 1907, said Wong See King (Ying) named all of the witnesses who might give any evidence in support of his right to land in or to enter the United States," said petitioner is informed and believes, and therefore avers, that said Wong See King (Ying) did not name all of the witnesses who might give evidence in support of his right to land in or to enter the United States.

III.

Traversing the third paragraph, alleging that the witnesses "did disclose to the said inspector at said hearings all of the facts within their knowledge relative to the right of the said Wong See King (Ying) to land in or to enter the United States, and denies the examination of the said witnesses was made by the said inspector, P. F. Montgomery, and that the same was full and complete.

And that the said witnesses at said hearings related all of the facts within their knowledge as such witnesses, and each of said witnesses, after being duly and regularly questioned at length and after having made answer to the questions propounded at said hearings, was asked to state anything further with reference to the nativity of or the right of the

said Wong See King (Ying) to land in or to enter the United States than had been stated in response to the questions propounded at said hearings.

And that each of said witnesses stated at such hearings that the answers by them given were all the information which they could give with reference to the nativity of the said Wong See King (Ying), or with reference to his right to land in or enter the United States.

And that in addition to examining the witnesses designated by the applicant, the applicant himself was examined at said hearings and permitted to testify with reference to his right to land in or to enter the United States.

And that the examination of the said Wong See King (Ying) was full and complete, and that at said examination said Wong See King (Ying) was permitted to testify at length with reference to his nativity and with reference to his right to land in and to enter the United States, and was in no manner prevented from giving all the facts within his knowledge with reference to said matters.

IV.

Traversing the fourth paragraph, and particularly that portion which states that said applicant made no request to be present, this petitioner, on his information and belief, states that said applicant was not informed of his right to be present, or to have an attorney present, at the examination of himself or of his witnesses, but, on the contrary, this petitioner, on his information and belief, denies that said applicant was permitted an opportunity to be present

at the examination of his witnesses, or that his attorney would be permitted, if present, to conserve the legal right of said applicant, as under the provisions of said rule referred to such attorneys is permitted to be present through sufferance, and is not permitted to assist in any manner or form by word or in writing the legal rights of such applicant; nor is he permitted to take any copy of any record made at the time of such hearing, or to except to any part of the same. Nor is he permitted to take part in any examination of the applicant or his witnesses, but that said examination was held secretly and without the presence of the said applicant or of his attorney.

Further traversing the fourth paragraph, this petitioner avers that said hearings were not held in accordance with a rule of the Department of Commerce and Labor, promulgated on May 31, 1907, modifying rules "5 and 6," referred to in said fourth paragraph, referred to in said answer, which rule is as follows:

DEPARTMENT OF COMMERCE AND LABOR,
BUREAU OF IMMIGRATION AND NATURALIZATION.

15 C & 3 2-6.

Washington, May 31, 1907.

Commissioner of Immigration, San Francisco, Cal.

Sir: It is hereby directed that hereafter in all cases of Chinese persons applying for admission at United States ports the privilege shall be accorded such persons of having present, when they and their witnesses are examined, counsel and an independent interpre-

ter of the Chinese language employed by such counsel and vouched for by him.

Counsel and the interpreter employed by him will not be permitted to take part in the examination of the Chinese applicant, further than to observe the proceedings as conducted by the Immigration officials and to take exception to any question or answer which, in their opinion, is not correctly and fairly rendered from English into Chinese or from Chinese into English, as the case may be. If any controversy arises between the Government interpreter and the enterpreter employed by counsel as to the correct rendition of a word or phrase, which controversy it is not possible to immediately settle to the satisfaction of all concerned by changing the form of question involved or otherwise, the matter shall be submitted to the decision of an umpire in the person of a qualified interpreter, either in the Government employ or not, but in any event acceptable to the officer in charge at the port of entry, to whom the subject of controversy shall be plainly and fairly stated in such a hypothetical manner as to prevent, if possible, his comprehending what solution would be acceptable to either of the parties, respectively, and his decision upon the disputed point shall be final. Interpreters appearing with counsel will be sworn to interpret correctly in performing the service described.

Attorneys practicing at ports of entry will be advised of this departure from the custom heretofore obtaining and of the limitations which are placed upon the privilege. They will also be notified that, before any person will be admitted to act as an inter-

preter for counsel, the name, address and occupation of such person must be furnished the officer in charge at the port, in order that the standing of the proposed interpreter in the community and his general reputation for honesty and capacity may be made the subject of investigation; approval of such person's admission to act as interpreter to be granted or refused as the result of such investigation may justify.

Every reasonable precaution shall be exercised by immigration officials to prevent any abuse of this privilege, and if any interpreter employed by counsel is detected in an effort to assist an applicant for admission by any undue or unauthorized means, counsel employing the interpreter will be immediately notified that the interpreter's services are no longer acceptable, and that he will not be permitted to again appear, but must be superceded by some man of unquestioned honesty; and, on the other hand, if it should transpire that the Government interpreter has been guilty in any case of a deliberately erroneous interpretation or translation, such fact, together with a sufficiently detailed statement to indicate the seriousness of the particular offence, shall be reported to the Department for such action as it may deem appropriate.

There is no intention that the methods of examination heretofore followed under the plain provisions of the statutes shall be departed from, or that the examination of Chinese applicants shall be made to partake of the character of the court proceeding, or be limited by the rules of evidence that apply to the examination of witnesses in cases heard in court. The

intention is that each and every applicant, through his regularly authorized and employed counsel and counsel's independent interpreter, may be accorded the utmost assurance that the statements made by him and the witnesses that he produces are conveyed to the minds of the Government officials charged primarily with the decision of his case, and eventually to the Department itself if an appeal becomes necessary, in the exact form and bearing the exact meaning intended by the Chinese idioms employed in giving expression to the testimony.

From the plan contemplated by the preceding *instructions has* been in operation for a period of sixty days you should report to the Bureau what, in your judgment, has been accomplished thereby, and in what respects, if any, the plan should be modified and your reasons for such belief.

Approved.

Respectfully,
(Sgd.) P. P. SARGENT,
Commissioner General.

FNL.

(Sgd.) LAWRENCE O. MURRAY,
Assistant Secretary.

APP/WP.

V.

Traversing the fifth paragraph, this petitioner, on his information and belief, denies that said applicant was duly and regularly adjudged admissible, and that it was duly and regularly determined by the respondent, H. H. North, that the said petitioner had no right to land in or enter the United States, and

that he was an alien Chinese person, and a native of the Empire of China, but on his information and belief said petitioner avers that said determination and order of said H. H. North was arbitrary and unreasonable, and was not a due and regular determination of the right of the said applicant to land in said United States, as a citizen thereof, and in this connection said petitioner on his information and belief avers, that said H. H. North, arbitrarily and unreasonably declined to consider or believe the proofs and evidence, documentary and otherwise, submitted by said Wong See King (Ying) in support of his claim that he was born in the United States, and a citizen thereof.

VI.

Traversing that portion of the sixth paragraph which states "that prior to taking of the said appeal, said applicant was at all times advised by counsel familiar with the rules and regulations herein referred to, governing the admission of Chinese into the United States, but neither the said applicant, nor his counsel suggested any witnesses other than those examined as hereinbefore mentioned, or any evidence other *then than* hereinbefore mentioned that could be offered or that should be received in support of the right of the said applicant to land in or enter the United States." This petitioner states that the applicant was not permitted to see or consult or advise with an attorney at any time by the said H. H. North and his subordinate officials, nor was said applicant allowed under the amendatory Rule of May 31, 1907, *set in* paragraph fourth thereof, to be present when

his witnesses were examined, or to be present at any stage of the proceedings preliminary to the taking of an appeal from the determination of said H. H. North, adjudging that said applicant was not entitled to enter the United States as a citizen thereof.

VII.

Traversing that portion of the eighth paragraph which states that all of the hearings had for the purpose of determining the right of the said Chinese applicant to land in or to enter the United States were full, fair and regular, and that said applicant had at all times full and fair opportunity to be heard, to offer evidence in support of his right to land in or to enter the United States." This petitioner on his information and belief denies that all of the hearings had for the purpose of determining the right of the said Chinese applicant to land in or to enter the United States were full, fair or regular, or *full, fair of regular,* and that said applicant had full and fair, or full or fair opportunity to be heard and to offer evidence in support of his right to land in or enter the United States, and in this behalf petitioner avers that said hearings were not full or fair or regular, and were not held in good faith, and that said applicant did not at all times have full and fair or full or fair opportunity to be heard and to offer evidence in support of his right to land in or enter the United States, and further avers, on his information and belief, that said applicant was not given the benefit of the amendatory rule of May 31, 1907, and that H. H. North, arbitrarily and unreasonably, declined to consider or to believe the proofs and evidence submitted

by said Wong See King (Ying) and others in his behalf, in support of his claim that he was born in the United States, and entitled to return thereto as a citizen thereof, and further avers that all and every part of the *proceedings the* matter of the application of the said Wong See King (Ying) were not held in good faith by said H. H. North and his subordinates.

VIII.

Traversing that part of the Ninth paragraph which alleges that all acts and things done or performed by this respondent in conducting said hearings, or in detaining the said Wong See King (Ying), were done and performed by this respondent acting as such Commissioner of Immigration, or done and performed by officers acting under the direction of this respondent as such Commissioner of Immigration at said port of San Francisco, and under and in pursuance of the laws of the United States relating to the exclusion of the Chinese persons and under the said rules and regulations promulgated and existing hereinbefore referred to, this petitioner denies each and every part thereof, and avers that at no time was said applicant given the benefit of the amendatory Rule of May 31, 1907, therein.

Wherefore, petitioner prays that said Wong See King (Ying), a citizen of the United States, be discharged from the custody of the respondents herein, and be forthwith restored to his liberty.

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

————, being duly sworn, deposes and says: That he is the petitioner in the above-entitled matter; that he had heard read the within traverse, to the respondent's return to the writ of habeas corpus, and knows the contents thereof; that the same is true of his own knowledge except those matters therein stated on information and belief, and as to those matters he believes it to be true.

The original traverse herein not appearing on the files of the court, it is hereby stipulated that this copy may be filed and considered as the traverse to the answer and return herein filed by the United States of America.

Dated Mch. 10, 1908.

GEORGE CLARK,
Asst. U. S. Atty.

[Endorsed]: Filed Mch. 9, 1908. Jas. P. Brown, Clerk. By Francis Krull, Deputy Clerk.

Clerk's Certificate to Transcript of Record.

I, Jas. P. Brown, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing and hereunto annexed one hundred and nine (109) pages, numbered from 1 to 109, inclusive, contain a full, true and correct transcript of the record in said Dis-

trict Court in the matter of Wong See Ying On Habeas Corpus, No. 13751.

I further certify that the cost of said record, amounting to $53.90, has been paid by appellant.

Witness, my hand and the seal of the said District Court at San Francisco, this 2d day of April, A. D. 1908.

[Seal] JAS. P. BROWN,
Clerk.

[Endorsed]: No. 1585. United States Circuit Court of Appeals for the Ninth Circuit. Wong See Ying, Appellant, vs. The United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California.

Filed April 2, 1908.

F. D. MONCKTON,
Clerk.

No. 1585

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WONG SEE YING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Respondent.

Notice of Intention to Move *Ex Parte* for Bail—Together With Condensed Statement of Case and Argument.

JOHN C. CATLIN,
Attorney for Appellant.

STIDGER & STIDGER,
Of Counsel.

PRESS OF THE JAMES H. BARRY CO.
212-214 LEAVENWORTH ST.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WONG SEE YING,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

No.

NOTICE OF INTENTION TO MOVE THE COURT, *EX PARTE,* FOR AN ORDER ADMITTING THE APPELLANT TO BAIL.

To Robert T. Devlin, Esq., United States District Attorney for the Northern District of California:

Please take notice that on Tuesday, the 4th day of May, 1908, at 10:30 a. m., at the courtroom of the above-entitled Court, in the Postoffice Building, in the City and County of San Francisco, State of California, counsel for the appellant will move the Court, *ex parte,* to admit the appellant to reasonable bail.

JOHN C. CATLIN,
Attorney for Appellant.

STIDGER & STIDGER,
Of Counsel.

CONDENSED STATEMENT ON APPLICATION FOR BAIL.

Wong See Ying, *a Chinese person,* upon arriving at the port of San Francisco applied for admission to the United States, alleging that he was a native-born citizen thereof. His application was denied by the Commissioner of Immigration, which denial was affirmed upon appeal to the Secretary of Commerce and Labor. He then applied to the United States District Court for the Northern District of California for a writ of habeas corpus. His application was granted and the writ duly issued, but upon the return thereof, after a hearing, the same was discharged and the applicant remanded to the custody from whence he was taken. From this order he appealed to this Honorable Court, and the clerk thereof set a day certain, to wit: the 4th day of June, 1908, for the same to be heard. In the meantime the said Wong See Ying remains confined and restrained of his liberty in the detention sheds at the Pacific Mail Dock, and will in all probability remain there for a long time, unless an order admitting him to bail is made.

ARGUMENT.

Bail, in cases of this character, is entirely within the discretion of this Court.

We are led to believe that the general tendency of the courts, for some years, has been to refuse bail to

Chinese persons applying for relief against real or fancied unfairness of the administrative officers of the government. However that may be, we are certain that the settled policy of counsel for the government has been to strenuously oppose the release of such persons from actual restraint upon any consideration whatever. We believe that the reason for such strict policy has in a great measure disappeared since Chinese persons alleging citizenship have been accorded a standing in court.

The strict rule, that the decision of the Commissioner of Immigration and of the Secretary of Commerce and Labor in cases of this character is final, has been so modified by the Supreme Court of the United States that in certain cases, upon proper petition, a judicial review may be had.

> *Chin Yow* vs. *The United States,* 208 U. S., p. 8.

It is broadly held in that case that a Chinese person who alleges that he is a citizen and that he was denied a fair hearing by the administrative officers of the Government stands on a different plane from other Chinese immigrants, and will be given a day in court.

The case at bar is such a case.

Wong See Ying does not come to this Court challenging the law or its justice. He does not come to mark the way for others to follow, for Chin Yow, sick and weary after his long and bitter battle, has already

blazed that trail. He does come, however, with accusing finger pointing to broken laws and violated rules.

His is not a test case; it stands on its individual merits. Other cases along similar lines may follow, but we do not apprehend that there will be many, as the decision in the Chin Yow case will have a tendency to make the administrative officers more careful in the future. In view of the standing given Wong See Ying by the rules set in that case, we submit that it would be no more than substantial justice to admit him to bail.

OTHER REASONS.

Wong See Ying is a young man, active and healthy, to whom the life of inaction in that cheerless prison, the much criticised and condemned detention sheds, is especially irksome. He is poor and this proceeding has been expensive, but, were he free, his blood cousin Wong Hong Ping, a merchant of San Francisco, who petitioned for the writ in this case, would care for him and give him the opportunity to earn and partially defray the heavy expenses incurred in this case. Thus in case the final determination of this Court is favorable to him, he will not land in the United States a pauper, weakened by months of imprisonment, or, in the event that the decision is unfavorable, he could return to China with a little money.

His detention pending the determination of this case can be productive of no good, but may result in many evils, ill-health occasioned by confinement not being the least to be feared. He has been accused of no crime, and although now in an unfortunate condition, may be, and probably is, as good and worthy a young man as the average young white man in happier circumstances.

We submit that this motion is made in fairness and candor, with no end but to aid the fair and proper administration of justice, and we earnestly urge that it should be granted and Wong See Ying admitted to reasonable bail.

JOHN C. CATLIN,
Attorney for Appellant.

STIDGER & STIDGER,
Of Counsel.

No. 1585

9.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WONG SEE YING,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Opening Brief on Behalf of Appellant in Error.

JOHN C. CATLIN,
Attorney for Plaintiff in Error.

Press of The James H. Barry Co.
212-214 Leavenworth St.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

WONG SEE YING,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 1585.

STATEMENT OF THE CASE.

This is an appeal from an order of the District Court of the United States, in and for the Northern District of California, discharging a writ of *habeas corpus* and remanding this appellant to the custody of the Commissioner of Immigration at the port of San Francisco, who is holding him in restraint with the intention of sending him out of the country, against his will and without his consent.

The appellant is *a Chinese person,* who, upon arriving at the port of San Francisco, applied to the immigration authorities of the United States for admission thereto, alleging as a reason that he was a native-born citizen and entitled to enter as a matter of right. He

was given the customary examination before the Chinese Bureau in charge of Hon. Hart H. North, Commissioner of Immigration at the port of San Francisco. This examination or hearing formally complied with the rules of the Department of Commerce and Labor and was briefly as follows: This appellant was given the opportunity of naming his witnesses and did so as far as he was able; he was also represented by counsel as far as the rules of the department allow such representation, and as far as self-respecting counsel may take advantage of such rules (Tr. of Rec., pp. 104, 105, 106, 107). His examination was separate and apart from that of his witnesses and their examination was separate and apart from him before an Inspector of Immigration, who reported an abstract of the testimony taken and his views and conclusions drawn therefrom to the Inspector of Immigration in charge, with a recommendation that the application be denied, who in turn reported it to the Commissioner with a like recommendation.

The Commissioner, although he denied the application, was dissatisfied with the report and sharply reprimanded the Inspector who conducted the examination (Tr. of Rec., pp. 91-92). We expect to convince the Court that, though soundly administered, the reprimand did not even touch upon the gravest errors of the report and recommendation.

Upon the final denial of his application by the Commissioner the appellant appealed to the Secretary of

Commerce and Labor, who dismissed the appeal upon the recommendation of the Commissioner-General of Immigration, who summed the case up.

While in this case we admit that the proceedings were *formally* in accordance with the rules of the Department, we believe that a fair hearing in good faith such as the law contemplates was denied the applicant.

Chin Yow vs. *U. S.,* 208 U. S., p. 8.

We believe that the law was grossly violated in letter and spirit in almost every step and that the evidence of such violation is apparent in every word and line of the record.

With this opinion strongly settled appellant petitioned the District Court for the writ of *habeas corpus,* alleging in substance that he was a citizen of the United States and had been denied a fair hearing in good faith (Tr. of Rec., pp. 7, 8 and 9), which allegations were made stronger in his traverse to the return (Tr. of Rec., p. 108, end of paragraph VI, and p. 110, end of paragraph VII).

We rest on the assumption that the petition for the writ and the two portions of the traverse to the return bring us directly and squarely within the rule laid down in *Chin Yow* vs. *U. S., supra.*

Here we believe an explanation is due. We would have pleaded the matter more directly in the petition had the text of *Chin Yow* vs. *U. S.* been before us, but at the time the petition was filed we had *telegraphic*

news only that the Supreme Court had rendered its opinion in that case. The many errors of omission (and some of commission) in the traverse are due to the fact that a hastily prepared copy, the only available one, was used in place of the original that was mislaid and disappeared almost as soon as it was filed (see Tr. of Rec., p. 111, stipulation signed George Clark).

The writ of *habeas corpus* was duly issued and a return and a traverse to the return were filed.

Upon the hearing of the matter two witnesses were sworn and testified, and the whole of the record of the proceedings and appeal before the immigration authorities was introduced and admitted in evidence. We also offered seven witnesses whom we named for the purpose of proving that this appellant was a native-born citizen of the United States. An objection was made to this offer and was sustained by the Court, whereupon an exception was noted (Tr. of Rec., pp. 39 and 40). This ruling of the Court we assigned as error (Tr. of Rec., pp. 98 and 99). The Government introduced two witnesses and the matter was submitted.

In a written opinion wherein the reasons for so doing were fully set forth, the Court discharged the writ of *habeas corpus* and remanded Wong See Ying, this appellant, to the custody from whence he was taken and it was so ordered (Tr. of Rec., p. 96). From this order we appealed to this Honorable Court and assigned certain errors, which are in the assignment of errors fully set forth (Tr. of Rec., pp. 98-99).

APPELLANT'S THEORY OF THE CASE.

That portion of the immigration service of the United States that deals exclusively with Chinese persons has accomplished a stupendous task. The horde of Chinese who a quarter of a century ago bid fair to outnumber the whites in the State of California has practically disappeared, and but a few thousand of them now remain and those few are scattered throughout the whole country. With this great labor we have no fault to find but congratulate them on a duty well and fairly done. In the many thousand cases upon which they have passed, in the vast majority substantial justice has been meted out. Their never-ceasing diligence against an encroaching race of alien immigrants whose civilization was hostile to ours has brought about a solution of a problem of the most serious character, but has led to an enforcement of the laws and of the rules of the Department of Commerce and Labor with an unfairness that can not be tolerated when used against a person who claims to be a citizen of the United States.

Chin Yow vs. *U. S.,* 208 U. S., p. 8.

It is due to the overzealous efforts of these immigration officers that Wong See Ying, the appellant in the case at bar, is in the unhappy situation that he now finds himself. In this case the methods of these officials have worked a great and grievous injustice to a citizen of the United States.

The first question to be presented to this Court for its consideration should be: What is the fairness and good faith that is guaranteed by the law to applicants for admission to this country in cases like the one now under consideration? The Supreme Court, by its opinion in the Chin Yow case cited above, has settled forever any doubts as to the applicant's right to such a hearing.

The term is usually used in other branches of the law, especially in the law of contracts and is so generally understood that it requires little or no explanation or argument. "Good" and "faith" are two of the best words in the language, and to collect together the various shades of meaning given to them would require the editing of a thesaurus. It is somewhat difficult to apply the principles of the law of contracts to a case like the one under consideration. Hundreds of cases might be cited which defined the term, but nearly all of them relate to and savor of contracts.

The following definition, which has found its way into the statute law of some of the States and into the decisions of the courts of others, seems to fit this case and we submit that the term needs no better or wiser definition, and that the Supreme Court, in its opinion in the Chin Yow case, meant good faith of this order.

> "Good faith consists in an honest intention to abstain from taking any unconscious advantage of another, even through the forms and technicalities of law, together with an absence of all information or

belief which would render the transaction unconscientious."

Black's Law Dict., p. 543;
Bouvier's Law Dict. (Rawles' Revis. Vol. 1), p. 887;
Rev. Stats. Okl., 1903, Sec. 2787;
Rev. Codes N. D., 1899, Sec. 5114;
Civ. Code, S. D., 1903, Sec. 2448;
Cone vs. *Ivinson,* 4 Wyo., p. 203;
Renoudet Co. vs. *Shadel,* 52 La. Ann., 2094; 28 South., pp. 292-294;
Friedrich vs. *Fergen,* 91 N. W., pp. 328-330;
Gress vs. *Evans,* 46 N. W., pp. 1132-1134.

Applying the above definition, it is not presumptious to expect that the administrative officers should have given the applicant a fair start, by laying aside all prejudice against a class among which he is unfortunate enough to be numbered; a class unlawfully and arbitrarily discriminated against in the matter of the degree of credence to be given to their testimony, which classification is neither authorized by law nor consistent with ordinary justice. Neither is it presumptious to assume that this fairness and good faith should remain with him through every step of the proceedings, including his appeal and until the final determination of his case, everything in the record in his favor inuring to his benefit, and nothing being used against him that is not in the record.

While we can not believe that it was ever intended by the law that a set of rules so manifestly unjust should ever apply to a citizen, we are prevented from urging that phase of this case by the opinion of the Supreme Court in

U. S. vs. *Ju Toy,* 198 U. S., p. 253,

although we are convinced that before actual justice will ever be accorded to a citizen of the Chinese race law or laws will have to be framed enlarging the privileges and immunities of citizens generally. We are forced to this conclusion by reading the dissenting opinion of Mr. Justice Brewer in the Ju Toy case, above cited, and by realizing that when authorities so eminent differ so widely there will be dissatisfaction until the legislative arm of the government takes some action that will settle the question. One class of native-born citizens, however small it may be, holding certain truths to be self-evident, can never feel secure while they are subjected to a set of rules that sometimes entail the most humiliating treatment, together with long periods of imprisonment, when all other citizens, whether native-born or otherwise, are free and unhampered by them. But as these rules do exist and are recognized by the courts to be in full force, this appellant is confronted, not by a theory, but by a condition with which he must deal. Therefore, we urge upon this Honorable Court that it consider this case as though the citieznship of the appellant had been

proved. It is not his fault that he comes here with that question unsettled. The proof was offered in the District Court but was refused. We also urge, that however strict and seemingly harsh the rules of the Department of Commerce and Labor may be, their spirit, like the spirit of all law, must be eventual and exact justice and that they must be followed, not only in form, but with the same fairness and good faith that would be exercised by a regularly constituted court, presided over by a learned and a just judge.

THE LAW OF THE CASE.

Stripping the question before the Court of all irrelevant and unnecessary argument and going directly to the heart of this case, we assert and submit that there is but one case in point.

Chin Yow vs. *U. S.,* 208 U. S., p. 8, *supra.*

As we challenge neither the statute, nor the rules dictated by the Department of Commerce and Labor to facilitate its enforcement, and as we do not urge that this appellant is not subject to the jurisdiction of the officers of that department, if the same is fairly exercised not even the case of

U. S. vs. *Ju Toy,* 198 U. S., 253, *supra,*

applies because in that case those rules were directly challenged on a petition which alleged only that the

applicant was a citizen of the United States. The question of good faith or fairness was not an element in that case at all, while in the case at bar, where we claim simply and directly that the law and rules have been openly violated, and that the record bristles with evidences of such violation, it is the crux.

In connection with a portion of this case affecting one alleged error of the District Court, which error is the second assigned in the assignment of errors (Tr. of Rec., p. 99), we submit that a large part of the opinion in the Chin Yow case, *supra,* is *obiter dictum.* That case squarely holds that upon a petition by a person who alleges that he is a citizen of the United States and has not had the hearing before the administrative officers that the law contemplates he should have, a writ of *habeas corpus* should issue and a judicial review allowed upon the questions presented.

Upon that portion of the Chin Yow decision we rest our main case.

Upon the hearing on the return to the writ of *habeas corpus* in the District Court, the appellant offered seven witnesses to prove that he was a citizen of the United States. This offer was objected to by counsel for the Government, the objection was sustained by the Court and an exception taken and noted for appellant (Tr. of Rec., pp. 39, 40, 41). Appellant assigned the refusal of the Court to hear the testimony of these seven witnesses as error (Tr. of Rec., p. 99).

While this refusal is apparently justified by some portions of the Chin Yow case we claim, and it is not without hesitancy that we do so, that those portions of that decision which seem, by way of caution, to limit the *nisi prius* court as to how it shall proceed in a matter before it, is *obiter dictum.* As such it should not have been considered by the *nisi prius* court, and should not be considered by this Court, and especially is this so in the case at bar, where a following of that ruling converts the most simple of all inquiries, that of a return upon a writ of *habeas corpus,* into a most complicated and ponderous proceeding.

Chin Yow, in the District Court upon a certain petition, had been denied a writ of *habeas corpus,* and the only thing before the Supreme Court, when the case came to it upon an appeal from that order, was whether or not the writ under the circumstances should issue. Manifestly, on that appeal, there could have been nothing else for the Court to consider.

Thus, the Supreme Court in that case determines a question of law that was not before it and that had not been presented or argued by counsel and set as a precedent, to be followed by *nisi prius* courts in *habeas corpus* proceedings, a rule that not only works a hardship upon an applicant for *habeas corpus,* but also works a hardship upon the Court in that it imposes upon it a multitude of proceedings where one proceeding would suffice. Under that rule it must first be determined whether the hearing before the immigration

officers had been fair and in good faith or not. That, as the Court will see from the record presented in this case, is a question that can not readily be determined without the record being taken under advisement.

Then, if the Court determined that the hearing had been fair, it would be necessary to hold another session of court to inquire into the citizenship of the applicant, but if the Court reached the contrary conclusion and discharged the writ of *habeas corpus,* and, as in this case, the applicant should appeal, only *half* of his case could be taken to the appellate court. Thus, two appeals would be required in the same case. It is possible and even *probable* that such a case might twice come before the Supreme Court on *certiorari,* in which event many years would elapse before its final determination. Such a condition is unjust in the extreme, and one that may be readily and simply avoided.

Unless this Court is convinced by the testimony of his witnesses that appellant is in fact a citizen of the United States, after it has first been convinced and determines that his hearing before the bureau was unfair and not given in good faith, are we not confronted not only by a possible but by an actual situation like the one above depicted?

It will be readily understood that few citizens would care to contemplate, much less to undertake so arduous a labor, and practically no native who had departed from this country in his youth, as did this appellant, unless he belonged to the privileged classes, could maintain the great cost of such a double appeal.

Bail has not as yet been allowed in this case and *may* never be.

Then truly may it be said that this citizen is in a sorry plight. Expatriation or years of imprisonment stare him in the face. Even were he allowed his liberty on security, he may be compelled to fight a long and bitter battle extending over years at a cost almost, if not quite, impossible for a poor man to meet.

It seems certain that the Supreme Court of the United States never intended by a mere *obiter dictum* to place a person seeking justice in such a hopeless position.

The law of *obiter dictum* has been clearly defined and rigidly adhered to by the courts of the United States. The Supreme Court has always held without qualification that dicta should not control in a subsequent suit, and that observations unnecessary to a decision ought not to outweigh important considerations leading to different conclusions.

United States vs. *Moore,* 3 Cranch., p. 172;
Cohens vs. *Virginia,* 6 Wheaton, 399-402;
Ex parte Christy, 3 How., 322;
Wisconsin R. R. vs. *Price,* 133 U. S., 509;
Jenners vs. *Peck,* 7 How., p. 612;
Cross vs. *Burke,* 146 U. S., 87;
In re Woodruff, 96 Fed., pp. 317-322;
Alferitz vs. *Borgwardt,* 126 Cal., pp. 201-209;
Hans vs. *Louisiana,* 134 U. S., 20.

In *Hans* vs. *Louisiana, supra,* Mr. Justice Bradley, in commenting on some of the language of Chief Justice Marshall, in *Cohens* vs. *Virginia* (*supra*), says:

> "It must be conceded that the last observation of the Chief Justice does not favor the argument of plaintiff, but the observation was unnecessary to the decision, and in that sense *extra judicial,* and though made by one who seldom used words without due reflection ought not to outweigh the important considerations referred to which lead to a different conclusion."

A case more directly in point than *Hans* vs. *Louisiana, supra,* could not be found nor one better suited to illustrate how far learned judges may go in uttering *obiter dictum.* In *Cohens* vs. *Virginia, supra,* where the Court was much pressed with some portions of its opinion in *Marbury* vs. *Madison,* Mr. Chief Justice Marshall does not hesitate to lay down the rule, although dealing with his own opinion. He says:

> "It is a maxim not to be disregarded that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question before the Court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it are considered in their re-

lation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

Cohens vs. *Virginia, supra,* is cited by and the above language quoted in

Carroll vs. *Carroll's Lessees,* 16 Howard, pp. 275-287.

Before closing this portion of the case for appellant, we quote the remarkable language of the late Mr. Justice Temple of the Supreme Court of California, used in *Alferitz* vs. *Borgwardt, supra:*

"Laws are not made by judicial decisions. The Court simply determines the rights of the parties to the action in that particluar controversy. It is no part of its purpose even to declare the law. It simply applies to the controversy the law as it exists when the alleged rights or liabilities accrued. The decision has never been thought to have the force and effect of law except in that special controversy. In other suits, it is authority more or less persuasive according to the reasonableness of the rule. Courts have never thought themselves bound by it as they are by a valid statute. And if it is manifestly wrong the community does not act upon it. A lawyer who would have advised a client to rely upon the Berson case in making a loan would show his incapacity.

"No doubt an appellate court assumes a very grave responsibility when it reverses a former decision which has become a rule of property, or the

law of contracts, and, whenever this is done, it must be understood that the Court has not only considered the objections to the former decision, but the evils which may follow from its reversal."

We also suggest that Mr. Justice Brewer's concurrence *in the result* is not a concurrence in those portions of the Chin Yow decision that do not effect the exact point in issue in that case.

If our position on this particular portion of the case at bar is correct, we desire to earnestly impress upon the Court that it would be no more than justice for it to consider the testimony of the witnesses taken at their examination before the bureau, and if convinced by it that this appellant is in fact a citizen of the United States, to view the rest of the case in the light that a citizen, and not a fraud is suppliant before it. We also urge that in the event of this Court's reaching the conclusion that a fair hearing in good faith had been denied by the immigration officers, and is convinced that a citizen has been wronged thereby, it order this prisoner discharged from custody forthwith.

Leaving the position taken above, we submit to the Court that the testimony of the seven witnesses offered by appellant to prove that he was a citizen of the United States was relevant in any event, as a circumstance of his case to be considered with the other testimony on the issue of the unfairness of the hearing before the bureau. It cannot be denied that it would have been of inestimable value in that regard, for had

the District Court been convinced of its truth, the element of *fraud* on the part of the applicant, would have been eliminated. That being so, the other part of his case would have been proved with much more ease by reason of the fact that the Court would much more readily receive the proof.

ARGUMENT ON THE LACK OF GOOD FAITH AND THE UNFAIRNESS OF THE HEARING BEFORE THE OFFICERS OF THE DEPARTMENT OF COMMERCE AND LABOR.

We approach this point, which is covered by the first and third errors in the Assignment of Errors (Trans. of Rec., pp. 98-99), with confidence, believing that this Honorable Court will not refuse to bring out of the chaos into which it has been plunged by prejudiced and irresponsible subordinate officers, the administration of the laws regulating Chinese immigration and exclusion.

A most casual scrutiny of the record of the proceedings before the Chinese Bureau will show that the case of Wong See Ying was lost before it was presented. His was one of those cases arbitrarily classified as "raw native" cases, a classification not authorized by law, and one that practically settles the cases of certain Chinese persons applying for admission to these United States before they have been seen or heard. A "raw native" may in fact be a citizen and he may have a multitude of witnesses to prove his citizenship, but if by force of circumstances over which he has no control he should be so unfortunate as to come within the scope of the

"raw native" class, as arbitrarily invented by the Commissioner of Immigration, his witnesses count for naught and his citizenship must be lost under a cloak of prejudice that smothers justice and denies a man the right to set foot upon the soil of his native country. He is a "raw native" and as such his standing is settled, whether he be a citizen or not.

A "raw native," according to the Commissioner of Immigration, is one who claims to have been born in this country, leaving it at an early age, but seeking to return for the first time. (Testimony of Comr. North, Tr. of Rec., pp. 28-29-30; also letter of Chinese Inspector, Tr. of Rec., p. 80, and Judgt. of Comr. North, Tr. of Rec., p. 92.)

Let us examine into and learn, if we may, what is meant by a "raw" native case.

The Commissioner of Immigration at the Port of San Francisco originated that term. It is slang and as such should have no place in the official vocabulary of a man who occupies so high a position in the government of this republic, and upon whose judgment other men are imprisoned for long periods of time or exiled forever from their native land. The gentleman is not to be congratulated upon his selection of the term nor on the spirit that prompted him to bring into a solemn proceeding, the jargon of the street.

But, be that as it may, he invented or originated it and it has taken its place in the vernacular of the Chinese Bureau. It appears twice in the record, once

in the report and recommendation of the Chinese Inspector who examined this particular case (Tr. of Rec., p. 80), and once in the letter of the Commissioner of Immigration which was the final judgment against the applicant (Tr. of Rec., p. 92). In both instances it is quoted as slang and therefore we consider it in its meaning in contemporary slang and not in its legitimate sense.

The Commissioner gives his definition of the term and displays some pride in his originality (Tr. of Rec., p. 28). By reading his testimony on that page and the following page it will be seen that that kind of cases are not popular with the Immigration officers of the United States. In the contemporary slang of the day the word "raw" is significant, and its meanings, though varied, are well defined.

In its legitimate sense it means:

> "1. Not altered from its original state; not roasted, boiled or cooked; not subdued by heat; as raw meat.
>
> "2. Not covered with the skin; bare, as flesh; as a raw spot.
>
> "3. Unseasoned; inexperienced; unripe in skill; as raw recruits of the army or navy.
>
> "4. Bleak; chilly; cold, or rather cold and damp; as a raw day; a raw, cold climate.
>
> "5. Not spun or twisted; unmanufactured; as raw silk or cotton; raw material of any kind.
>
> "6. In ceramics, unbaked."

In its slang sense it means:

"7. Unjustifiable; cheeky; impertinent; as a raw act. (Slang.)"

Webster's Universal Dictionary, 1905-6.

The above definitions (1 to 7, inclusive) are taken *in haec verba* from the authority above cited, but we claim that in slang "raw" has a great many other meanings the lexicographers have not set down. For instance, it means *risque;* as a raw story is one that may not be told in refined company. It's meaning also denotes fraud; as one may make a "raw" business proposition. It means more than mere fraud; it means palpable and apparent fraud, as a "raw" deal, or a race that was "raw." It is sometimes ironically used, as one may speak of a "raw" Irishman or a "raw" Missourian.

If it was used in the last sense in this case, then indeed "is the laugh" on Wong See Ying. Not that he laughs, for the merriment under the circumstances is probably confined to those droll spirits of the Chinese Bureau.

The slang meaning of the word "raw" always bears with it opprobrium—it is never used in gentleness or kindness—and as the Commissioner was the originator of the term as applied in cases of this character; and as its accepted meaning in good English can not be tortured into sense in its application here, and as he and his subordinates quote the word as slang, he must stand by its slang meaning.

The meaning of language familiar to all classes may not be wrested from its established import and the popular or received import of words furnishes the general rule for its interpretation.

> *Maillard* vs. *Lawrence,* 16 How., 251-261;
> *Greenleaf* vs. *Goodrich,* 101 U. S., 284.

Does the Commissioner mean that this "raw native" was not altered from his original state, or that he was not roasted, boiled or cooked, or not subdued by heat? Does he mean that he was not covered by skin, or was bare, or unseasoned, or unripe in skill, or bleak or chilly or cold, or not spun or twisted, or that he was unmanufactured or unbaked?

Obviously he means none of these things.

If he had meant the word to be used in any of its accepted meanings, he would not have quoted it. That he intended it to be understood in its slang sense is apparent from his own language.

> "As to this case, the applicant is what we call a 'raw native,' that is, he claims to be 28 years of age; to have been born in the notorious Spanish Building, this City, in 1879, and at the age of one year, or in 1880, to have departed for China with his mother, where he has since resided. This departure, of course, is before the beginning of our records. He picks out for a father a Chinese laborer who left this port for home about a year since; he offers in his own behalf the testimony of three Chinese witnesses. It is of the ordinary char-

acter in applications of this sort. By going over our files, hundreds, and probably even thousands, of records may be found wherein the testimony would not vary in any material particular, and thousands of like raw natives have claimed the Spanish Building as a birth place.

"The evidence is wholly unconvincing, and I believe that I am neither arbitrary nor unfair in rejecting it entirely. Personally, I feel that the evidence does not prove in any respect that this applicant was ever here before, much less that he is a native." (Tr. of Rec., p. 92.)

Having determined the meaning of the word raw—both as to its legitimate English value and as to its significance in contemporary slang—let us see what the word slang means.

"Slang. (Origin obscure; prob. allied to *sling* in such phrases as to sling epithets, sling reproaches, etc., and in same sense to Norw. *sleng,* a slinging device, from *slengia,* to sling.

"1. Colloquial words or phrases having hardly the stamp of general approval, and often regarded as inelegant incorrect, or even vulgar. Slang may consist either of unmeaning jargon, to which restricted specific meanings have been given, or of expressions apparently legitimate, but used in an arbitrary, capricious or grotesquely metaphorical sense.

"2. Originally thieves' jargon; the cant expression used by vagabonds, beggars and theives.

"Slang *v. i. and v. t.;* slanged, *pt.; pp.;* slanging, *ppr.*

I. *v. i.* To use slang; to make use of vulgar or abusive language.

II. *v. t.* To address in vulgar, abusive language; to abuse with slang."

Webster's Universal Dictionary, 1905-6.

Is it not evident that Wong See Ying, the appellant, was "slanged" (*supra,* Slang *v. i.* and *v. t.*) by the officers of the United States whose duty to him and to mankind, and to their country, was to treat him fairly?

Thus we see that he went into his examination a "raw native" or an unjustifiable, cheeky, impertinent "native." In other words he was an applicant for admission to the United States whose claims were unjustifiable, cheeky or impertinent. This arbitrary and unlawful presumption of guilt followed him through every step of the proceedings from his first interview with the Inspector of Immigration, on board the steamer, to the final letter of the Commissioner-General of Immigration at Washington, which shows the confirmed prejudice usual in cases of this kind without the bad taste of using slang. The presumption of innocence to which murderers, gas-pipe thugs and ravishers are entitled was not only denied this young man, but it was replaced by a presumption of fraud and guilt so dark that it could not be pierced by the light of truth.

We now proceed to discuss with as much brevity as the importance of the matter will permit, the other phases of this case.

A point now regarded by us as being of the gravest importance, was at first overlooked, and indeed it might easily be passed over without being noticed unless attention were directed to it. It is to the long experience of the members of this Court, on the bench and at the bar, that we now appeal. We quote from the examination of Wong See Ying, the applicant, by the Inspector of Immigration (Tr. of Rec., p. 73). Beside the Inspector and the applicant there were present an interpreter and a stenographer (Tr. of Rec., p. 70).

"Q. Do you remember testifying before me on the steamer?

"A. I could not remember.

"Q. Is that your signature? (Showing signature of applicant on statement made on October 16th, 1907.)

"A. Yes, that is my signature.

"Q. You did testify before me on the steamer?

"A. I was afraid to lift up my head and look at you, and if I did perhaps I could recognize you.

"Q. Why were you afraid to lift your head up?

"A. I was examined but a few words when I went in and bowed my head, and I didn't lift my head.

"Q. Why were you afraid?

"A. I made a mistake by saying I was afraid.

"Q. Then nobody has frightened you?
"A. No, I was not afraid. I made a mistake."

Is it not evident from this remarkable dialogue that some part of the testimony has been omitted from the record, or that the witness was under duress and intimidated, or influenced by fear of physical violence. By no other theory can this unaccounted breakdown of the witness be explained.

He first states, calmly, that he was afraid of the inspector; then he reiterates the statement *twice* in detail, when suddenly without apparent reason he retracts it. This breakdown bears all the marks of panic. Exactly what occurred we do not know, so we can make no specific charge—but it is apparent to us that either duress was used with this witness or that some of his testimony was suppressed.

In our experience we have never observed such an occurrence in a court room. We have seen witnesses change their front, but only when brought face to face with conflicting statements or when worn out and exposed by pitiless cross-examination. We will submit this matter to the Court without further argument, but with the suggestion that if the applicant, while a witness in his own behalf, was intimidated, or if a portion of his testimony was suppressed, and not reported to the superior officers of the Department of Commerce and Labor, then fairness and good faith were entirely lacking in his case and had no part in its hearing or determination.

The Inspector before whom appellant's case was heard wrote three letters—the first of which must be regarded as an integral part of the judgment in this case, while the other two may be regarded as supplementary to and explanatory of the first. (Tr. of Rec., pp. 77-78-79-80-81; Tr. of Rec., pp. 85-86-87; Tr. of Rec., pp. 88-89-90-91.)

It is with the first of these letters that we have to deal. It is altogether a most novel letter and as it must be thoroughly understood before a just solution of this case can be reached, we will deal with it shortly. The writer begins his letter by stating that the applicant and *two* witnesses testified. As a matter of fact there were three witnesses. He digests the testimony of these witnesses, but forgets the personality of one of them entirely. We make no point on that, however, as we believe that in this "raw native" case, where everything and everybody were presumed to be frauds, the number of witnesses or the value of their testimony could make no difference in what the preconceived judgment would be.

The letter makes one misstatement of fact, brands the applicant as a "raw native," makes a great deal of a slight discrepancy in the testimony and closes with its recommendation of denial.

As to the misstatement of fact, the letter says "that he" (the applicant) "can assign no particular reason for his not coming to this country until he was 28 years old." This misstatement was probably due to

the bad memory of the Inspector, for on page 72 in the Transcript of Record, in answer to the Inspector's own question, he says that his reason for not coming sooner was that his father *did not want him to.* Even with our western customs that seems a very good and sufficient reason, but according to the Chinese custom it is better still, for there a boy is not of legal age until he has married.

The discrepancy in the testimony, had it not been given particular stress by the officers, we would not notice. The young man said that his father was a tailor making new clothes. Obviously this was hearsay. The witnesses say the father was a launderer of new clothes. There can be no question but that the witnesses were right and the young man was wrong. The Inspector takes this view, for he says that the young man "was mixed." We think also that he was "mixed," and we state that no court or jury would consider and no trained lawyer would urge this discrepancy as discrediting the testimony of a witness unless there were other reasons as well. The letter closes with a recommendation that the applicant be denied admission and contains some remarkable language, which we quote:

> "As he is 28 years of age and was engaged in manual labor in his own country until he decided to come here, this is an addition fact in his disfavor."

Since when, pray, has the law of the United States discriminated between citizens "engaged in manual labor" and capitalists or any other class of citizens?

This applicant applied for admission as a citizen, and not as one of a privileged class of aliens, and we can not see why the fact that he was a laborer should be an "additional" or any fact in his disfavor. Its use as such was a direct violation of the law and was probably thrown into the case to lend some degree of plausibility to a judgment conceived and rendered in prejudice. It only shows that the bureau officials feel that they can not be reached by the judicial arm of the government, and its use by them, without reprimand from their superiors, ought to be sufficient ground for the reversal of this case.

The other two letters of the Inspector above referred to have no particular bearing on the case in this Court. One is in relation to certain records in the Chinese Bureau, and the other considers the testimony of the witness who had been forgotten.

The letter of the Commissioner, which clinches the judgment against appellant, shows very slight consideration of the case. He says that it is a "raw native" case, which seems to be enough for the purpose. The reprimand to the Inspector only touches upon his having forgotten one witness. It is remarkable that the reprimand does not extend to the fact that in a case where it was not an issue, the fact that the applicant

was a laborer was used against him (Tr. of Rec., pp. 91-92; see also extract quoted herein, *supra*).

This case ends with the letter of the Commissioner-General of Immigration—a record of dogma, dictum, prejudice and misstatement. The first misstatement is small enough in itself, but is nevertheless a misstatement and shows that the Commissioner-General did not go into the testimony very deeply.

He says that applicant is coming to his cousin. There is nothing of the kind in the record, and as a matter of fact it is not so. The second misstatement of fact is somewhat graver, for on it some of the dogma of the opinion is grounded. He says, in speaking of this cousin, Wong Hong Ping: "It is hardly possible " that a boy 10 or 11 years old would have come to this " country without his family," etc.

The testimony shows that the boy was an orphan and that he came to this country with his uncle, the father of this appellant (Tr. of Rec., p. 56 and p. 57).

The statement that the records of his office show that Wong Hong Ping swore that he first arrived in this country in July, 1880, or only about three months prior to the time appellant was taken to China, deserves some attention. The Commissioner-General, in using evidence so damaging to a claimant to citizenship, should have set forth the record in full—that it might be seen by all. As it is not in the record in this case and was used for the first time upon the appeal, we do not feel that it should receive attention by us.

The explanation of this apparent hiatus, however, is simple. The Chinese calendar and the Gregorian calendar are so different that Chinese never accurately interchange a date from their system of recording time into ours. It is the same when we attempt to fix a date in the calendar of Kwang Sue, although, in our own calendar, it is familiar to us. Had the witness been confronted with this record, who can doubt but that he could have explained it in a satisfactory manner? His testimony throughout its whole extent carries with it the conviction that the truth is being told. Neither the Inspector nor the Commissioner regarded this discrepancy in time as of enough consequence to mention in their letters; but had they done so it could have been scrutinized, challenged or explained by the attorneys for the applicant at the time, even had it been necessary to have a further hearing.

> "Where a witness is inexperienced * * * inaccuracy in stating distance and computation of time do not justify discrediting his testimony, otherwise reliable."
>
> *The Carroll,* 8 Wal., p. 304.

This is our case.

We feel that we have demonstrated that a fair hearing in good faith has been arbitrarily denied this appellant by the officers of the government. We think that the record teems with evidence of it. A man who

applied for admission as a citizen was unlawfully classified, was slanged, was bullied and treated with contempt. A part of his testimony was suppressed, the fact that he was a laborer was used against him without warrant or authority of law. The testimony of his witnesses was misunderstood, garbled, misstated and stretched beyond its meaning in an effort to make it fail in its purpose, and he was prejudged and presumed to be a fraud through every step of his proceedings.

We might have argued at greater length and gone more deeply into detail, but we think that enough has been said. The testimony of the appellant and his witnesses before the bureau proved him, beyond the question of a doubt, to be what he claims to be, a citizen of the United States. We would have sworn more witnesses on that point in the District Court had we been permitted, but their testimony would have been but cumulative. What more could it be in a case already proved? We urge that if this Court find for us on the first point, that it consider the whole of the testimony as it appears in the record, and do the justice that the recalcitrant administrative officers have failed and refused to do.

It is respectfully submitted that for various reasons urged in this brief, the judgment and order of the District Court discharging the writ of *habeas corpus* and remanding the appellant to the custody from whence

he was taken be reversed, and that this Honorable Court make its order discharging him from custody and restraint forthwith.

Respectfully submitted.

JOHN C. CATLIN,
Attorney for Appellant.

No. 1585

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

WONG SEE YING,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

ROBT. T. DEVLIN,
United States Attorney,
GEORGE CLARK,
Asst. United States Attorney,
Attorneys for Appellee.

Filed this.....day of June, A. D. 1908.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

PERNAU PUBLISHING CO.

No. 1585

IN THE

United States Circuit Court of Appeals

for the Ninth Circuit.

WONG SEE YING,
Appellant,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF ON BEHALF OF APPELLEE.

STATEMENT OF FACTS.

Wong See Ying, a Chinese person, the appellant, came to this country as a passenger on October 12th, 1907, aboard the steamship Manchuria. He came directly from the Empire of China.

On October 16th, 1907, on the arrival of the vessel, a United States Immigration Inspector, P. F. Montgomery, acting under H. H. North, United States Commissioner of Immigration, a respondent in the proceedings to obtain the discharge of Wong See Ying on habeas corpus, went aboard the steamship Manchuria and interviewed the appellant Wong See Ying (see Records of Hearings, Tr. pages 54 and 55). He asked the applicant who the witnesses were

that might give testimony relative to his right to land in the United States. The applicant named Wong Hong and Wong Woo. (Tr. page 55.)

On October 23rd, 1907, these witnesses were examined. (Tr. pages 55, 59 and 60.) On October 24th, 1907 (Tr. 63), the taking of the testimony was resumed. Two affidavits were executed on October 23rd, 1907, and were received in evidence (Tr. pages 68 and 69). On November 12th, 1907, the applicant himself was examined. (Tr. page 70.)

This testimony to which we have been referring the Court is contained in the record of the proceedings which occurred in the office of the Commissioner of Immigration at San Francisco in the matter of the application of the appellant here for permission to land in the United States. This record was first offered by the appellant on the hearing upon the return to the writ (Tr. page 32). It was then offered by the appellee. (Tr. 50.) The offer of the record was again distinctly made by counsel. (Tr. pages 33 and 34.) No intimation was made that it was in any way incorrect.

At the very outset of his testimony in the District Court H. H. North testified on being called for petitioner that although this case had been designated a "raw native" case, every case stood on its own merits. (Tr. middle page 29 and bottom of page 29.) On page 30, Tr. middle of the page, he testified that there were three Chinese examined before the case was denied by him; that he had landed thou-

sands of cases in which the witnesses were merely Chinese; that his opinion in this case and his conclusions were to be found in the record of the hearing of the application to land. That record was received in evidence and a part of it we have already referred to. Near the middle of page 35, the witness stated that he "certainly did give the testimony " offered a fair and sound consideration".

On cross-examination beginning near the bottom of page 35, Tr., he testified that the testimony on the hearing of the application was taken before Mr. Montgomery, the inspector; that it was reduced to writing, and reviewed by him, the commissioner. He stated (Tr. p. 36) that he had read all the evidence; that he had also reviewed the opinion arrived at by Mr. Montgomery, the inspector, and considered his recommendations.

He further testified (Tr. bottom of page 36 and page 37) that he had given to the attorney for the applicant, Mr. O. P. Stidger, notice of the decision denying the applicant permission to land, and that opportunity had been afforded the applicant to furnish any additional testimony that he might desire to furnish before the record in the case was forwarded to Washington; that the applicant had not availed himself of this privilege; that the entire record had been forwarded to the Commissioner General of Immigration (Tr. bottom of page 37), and that the Commissioner General of Immigration and the Secretary of the Interior had affirmed his

opinion by dismissing the appeal taken by the applicant.

There were called in behalf of the respondents in the hearing in the District Court, Inspector P. F. Montgomery, the inspector who conducted the examination of the applicant, and his witnesses, and H. H. North, one of the respondents.

The United States had been made a party by stipulation. (Tr. p. 25.)

Mr. Montgomery testified (Tr. page 41 and page 42) that he had first taken a preliminary statement of the applicant aboard the vessel; that thereafter in the offices of the United States Commissioner of Immigration in the Appraisers Building at San Francisco (Tr. page 43) a hearing had been had for the purpose of taking the testimony of the witnesses for the applicant; that the witnesses had been sworn; that they had been examined through an official interpreter (Tr. page 43); that the testimony had been reduced to writing (Tr. page 44); that he himself had rendered an opinion to his superior officer, H. H. North. (Tr. 44.) That he had examined all of the witnesses offered in behalf of the applicant. (Tr. page 44.)

On cross examination (Tr. page 45) he testified that the witnesses were examined separately, as well as the applicant himself, and that the applicant was not notified; that he had a right to be present while his witnesses were being examined.

It was expressly admitted (Tr. page 45) on the redirect examination of this witness that the applicant had an attorney; he had appeared by an attorney, Mr. O. P. Stidger. This attorney helped to make the arrangements for the production of the witnesses (Tr. page 47), and had had notice of the hearing. The witness explained further on his redirect examination (Tr. page 48) that he had communicated in writing with the attorney with reference to the witnesses, and that the attorney had explained that all witnesses had been examined. (Tr. pages 48 and 49.)

H. H. North on being called for the respondents testified that under instructions from the Department of Commerce and Labor, it was his practice, upon request, to allow an applicant and his counsel to be present when the witnesses were being examined. (Tr. pages 50, 51 and 52.) Because the applicant and his attorney did not avail themselves of this privilege when they had the right so to do, cannot affect this case. On page 48, Tr., near the middle of the page, it was expressly admitted by the attorney for the petitioner that an attorney had appeared for the applicant in so far as he could appear under the supplemental rule of May 31st, 1907. This supplemental rule is found on page 4 of the Traverse. (Tr. pages 104-107.)

This letter is particularly referred to and fully explained by the witness, H. H. North, in his testimony. (Tr. page 49.)

ARGUMENT.

The applicant in this case was afforded every opportunity to present his testimony. The examination was conducted as required by the rules and regulations. These rules and regulations are set forth in paragraph 9 of the return. (Tr. pages 22-24 inclusive.) In addition the applicant would have been accorded such privileges as were allowed under the letter of May 31st, 1907, modifying regulations 5 and 6 had such privileges been requested by the applicant or his counsel. Such privileges were not denied the applicant.

The Chinese Inspector who took the testimony denied the application. (Tr. pages 77 and 85.) The Chinese Inspector in charge denied the application. (Tr. page 87.) The Commissioner of Immigration denied the application. (Tr. pages 91 and 92.) He stated "The evidence is wholly unconvincing, and I " believe that I am neither arbitrary nor unfair in " rejecting it entirely. Personally, I feel that the " evidence does not prove in any respect that the " applicant was ever here before, much less that he " is a native."

The opinion was affirmed by the action of the Commissioner General of Immigration, after a careful review of the testimony. (Tr. pages 93, 94 and 95.) The Secretary of the Interior concurred in the denial. (Tr. page 93.)

No other criticism of the testimony which was offered in support of the right of the applicant to land

need be made in behalf of the appellee here, than that which is found in the opinion of the Commissioner General of Immigration. He carefully analyzed the testimony and his opinion is logical and convincing. We submit that the only question presented by this case is whether an applicant may retry his case on a writ of habeas corpus. He had a fair hearing. Every witness that either he or his counsel could suggest was examined and after the testimony was taken and reduced to writing, opportunity was offered to supplement the record by additional proof in behalf of the applicant, prior to the forwarding of the record to Washington, upon the appeal.

The Supreme Court in the recent case of Chin Yow v. United States, 208 U. S. 8, expressly declared that where an applicant had a fair hearing, the Judicial Department would not review the evidence for the purpose of determining whether the judgment of the Immigration Department was correct.

It is not necessary that the hearing in these matters should be a judicial hearing within the stricter meaning of that term.

> United States v. Ju Toy, 198 U. S. 263; 49 L. Ed. 1044.

The exclusion or admission of aliens belongs to the political department of the government.

Necessarily the proceedings of that department in passing on the right of alien immigrants to land in the United States, or upon the right of a Chinese

person to land in the United States, are somewhat summary.

Yamataya v. Fisher, 189 U. S. 100; 47 L. Ed. 725.

Rule 7 of the Immigration Department implies that the applicant may supply additional evidence on the taking of his appeal.

United States v. Sing Tuck, 194 U. S. 161; 48 L. Ed. 920.

A writ of habeas corpus cannot be used as a writ of error.

Orteiza y Cortes v. Jacobs, 136 U. S. 330; 34 L. Ed. 464;

Ex parte Lennon, 166 U. S. 548; 41 L. Ed. 1110.

It is respectfully submitted that the only point before the District Court for determination was whether the applicant had had a fair hearing. On the evidence in this case the opinion of the District Court was clearly correct. In the Chin Yow case the allegations of the petition for an order to show cause why a writ of habeas corpus should not issue expressly stated that the applicant Chin Yow had offered testimony on the hearing of his application to land, which testimony the Commissioner of Immigration arbitrarily refused to receive, and which testimony, had the same been received, would have established the right of Chin Yow to land in the United States. There is not a single element of un-

fairness in the proceedings which were had in the Immigration Department in the case of this Chinese. The case is in no sense parallel to the Chin Yow case.

Respectfully submitted,

ROBT. T. DEVLIN,
United States Attorney,

GEORGE CLARK,
Asst. United States Attorney,

Attorneys for Appellee.

No. 1593

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

EMIL BIRCHER,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Montana.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

No. 1593

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FOR THE NINTH CIRCUIT.

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TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States District Court for the District of Montana.

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Names and Addresses of Attorneys of Record.

CARL RASCH, Esq., United States Attorney, Helena, Montana,
Attorney for Plaintiff and Defendant in Error.

GEO. W. MYERS, Esq., Miles City, Montana, and

Messrs. WALSH & NOLAN, Helena, Montana,
Attorneys for Defendant and Plaintiff in Error.

In the District Court of the United States, in and for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMIL BIRCHER,
Defendant.

Caption.

Be it remembered, that on the 20th day of December, A. D. 1907, an indictment was presented and filed herein, being in the words and figures following, to wit:

Indictment.

United States of America,
District of Montana,—ss.

In the District Court of the United States for the District of Montana.

Of the Term of November, in the Year of our Lord One Thousand Nine Hundred and Seven.

The Grand Jurors of the United States of America, duly impaneled, sworn and charged to inquire within and for the District of Montana, and true presentments make of all crimes and misdemeanors committed against the laws of the United States within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That the United States of America was, on the 17th day of November, A. D. 1907, and at all the times herein mentioned, the owner of that certain tract of public lands, situate, lying and being in the County of Custer, in the State and District of Montana, described as follows, to wit: Sections fourteen (14) and twenty-two (22), all of Section twenty-six (26) (except the northwest quarter of the northwest quarter, and part of the southeast quarter of the southeast quarter, and part of the east half of the northeast quarter), the principal part of the southeast quarter of section twenty (20), and part of the southeast quarter of the northeast quarter of section twenty (20), all in township seven (7) north, of range forty-nine (49), east of the Principal Meridian

imately nineteen hundred and twenty acres of land in the County of Custer, in the State and District of Montana, a more particular description of which said lands is to the Grand Jurors aforesaid unknown; and while the said United States was so the owner of all the lands aforesaid, one Emil Bircher, late of the State and District of Montana, on, to wit, the 17th day of November, A. D. 1907, in the County of Custer, in the State and District of Montana, did, wrongfully and unlawfully, maintain and control, and cause to be maintained and controlled by him, the said Emil Bircher, an inclosure of the said lands consisting of a fence of posts and wires, which said fence, then and there, inclosed all of the said tract of land comprising an area of approximately nineteen hundred and twenty acres of land, said lands so inclosed as aforesaid being public lands of the United States, and he, the said Emil Bircher, at the time of so maintaining and controlling said fence and inclosure as aforesaid, has no claim or color of title made or acquired in good faith, or an asserted right to said lands by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the United States to said lands, or any part or parcel thereof; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

CARL RASCH,
United States Attorney.

[Endorsed]: No. 1253. United States District Court, District of Montana. The United States of

America, Plaintiff, vs. Emil Bircher, Defendant. Indictment—a True Bill. H. G. Pickett, Foreman of Grand Jury. Carl Rasch, U. S. Atty., Dist. of Mont.

Witnesses: A. H. FESSLER.
ALBERT PRELLER.
E. S. FOLEY.

Presented to the Grand Jury in open court, by their Foreman, and in their presence, and filed this 20th day of December, A. D. 1907. Geo. W. Sproule, Clerk U. S. Dist. Court, Dist. of Montana. By C. R. Garlow, Deputy. Bond fixed at $500. W. H. Hunt, Judge.

Bench Warrant.

UNITED STATES OF AMERICA.

U. S. of America,
District of Montana,—ss.

To the Marshal of the United States, for the District of Montana, and his deputies, or any or either of them, Greeting:

Whereas, at a District Court of the United States of America, for the District of Montana, begun and held at the city of Helena, within and for the District aforesaid, on the 20th day of December, in the year of our Lord one thousand nine hundred and seven, the Grand Jurors in and for the said District, brought into the said court a true Bill of Indictment against Emil Bircher, for unlawfully fencing U. S. lands, as by the said Indictment now remaining on file and of record in said court will more fully appear;

to which indictment the said Emil Bircher has not yet appeared or pleaded:

Now, therefore, you are hereby commanded, in the name of the President of the United States of America, to apprehend the said Emil Bircher, and bring him before the said Court, at the United States District Courtroom, in the Federal Building, at Helena, Montana, to answer the Indictment aforesaid.

Witness the Honorable WILLIAM H. HUNT, Judge of said Court, and the seal thereof at Helena, in said District, on the 20th day of December, A. D. 1907.

[Seal of Court] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

MARSHAL'S OFFICE.

United States of America,
District of Montana,—ss.

In obedience to the Warrant, I have arrested the said Emil Bircher, on the 21st day of January, 1908, sixteen miles northeast of Miles City, in Custer County, State of Montana, and on the same day conducted him before the Honorable Frederick M. Kreidler, the nearest U. S. Commissioner in and for the District of Montana, who admitted him to bail in

the sum of Five Hundred Dollars, whereupon I released him.

Dated this 22d day of January, A. D. 1908.

ARTHUR W. MERRIFIELD,
U. S. Marshal.
By J. W. Haigler,
Deputy U. S. Marshal.

[Endorsed]: Title of Court and Cause. Bench Warrant. Carl Rasch, U. S. Attorney. Bail Filed at $500.00. Filed Jan. 27, 1908. Geo. W. Sproule, Clerk.

In the District Court of the United States, District of Montana.

No. 1253.

THE UNITED STATES OF AMERICA.

vs.

EMIL BIRCHER.

Arraignment and Plea.

Defendant, with his counsel, Geo. W. Meyers, in court and being arraigned, he answered that his true name is Emil Bircher, and thereupon defendant waived the reading of the indictment and time to plead, and thereupon defendant pleaded that he is not guilty and plea of not guilty entered.

Entered, in open court, January 25th, A. D. 1908.

GEO. W. SPROULE,
Clerk.

Attest a true copy of minute entry.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,

In the District Court of the United States, District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

versus

EMIL BIRCHER,
Defendant,

Verdict.

We, the jury in the above-entitled cause, find the defendant guilty in manner and form as charged in the indictment.

JNO. J. FALLON,
Foreman.

[Endorsed]: Title of Court and Cause. Verdict. Filed and Entered, Mar. 20, 1908. Geo. W. Sproule, Clerk.

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMIL BIRCHER,
Defendant.

Motion in Arrest of Judgment.

Comes now the defendant in the above named, and moves the Court that judgment herein be arrested and the passing of sentence be stayed, and that the

indictment herein be dismissed and that defendant go hence without day, for that the said indictment does not state facts sufficient to constitute a public offense.

WALSH & NOLAN, and
G. W. MYERS,
Attorneys for Defendant.

[Endorsed]: Title of Court and Cause. Motion in Arrest of Judgment. Filed March 21st, 1908. Geo. W. Sproule, Clerk.

In the District Court of the United States, District of Montana.

105th day November Term, 1907, Saturday, March 21st, 1908.

In Open Court.

No. 1253.

THE UNITED STATES OF AMERICA

vs.

EMIL BIRCHER.

Order Denying Motion in Arrest of Judgment, etc.

Defendant with his counsel and the U. S. Attorney present in Court. And thereupon defendant filed his Motion in Arrest of Judgment; and after due consideration, it is ordered that said motion be, and the same hereby is denied, to which ruling of the Court

defendant duly excepted, and exception is hereby noted.

And thereupon time for sentence waived.

Entered March 21st, 1908.

GEO. W. SPROULE,
Clerk.

Attest a true copy of minute entry.

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

In the District Court of the United States, District of Montana.

No. 1253.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMIL BIRCHER,
Defendant.

Judgment.

The United States Attorney with the defendant and his counsel present in court.

The defendant was duly informed by the Court of the nature of the charge against him, for the offense of wrongfully and unlawfully maintaining and controlling an enclosure of certain public lands of the United States, consisting of a fence of posts and wires, and comprising an area of approximately 1920 acres of such public land, committed on the 17th day

of November, A. D. 1907, in the County of Custer, in the State and District of Montana; of his indictment, arraignment and plea of not guilty; of his trial and the verdict of the jury of "Guilty" as charged in the indictment;

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the Court, thereupon the Court rendered its judgment as follows, to wit:

That whereas, said defendant having been duly convicted in this court of the offense of wrongfully and unlawfully maintaining and controlling an enclosure of certain public lands of the United States consisting of a fence of posts and wires, and comprising an area of approximately 1920 acres of such public land, committed on the 17th day of November, A. D. 1907, in the County of Custer, in the State and District of Montana, as charged in the indictment;

It is therefore considered, ordered and adjudged that for said offense, you, the said Emil Bircher, be confined in the Lewis and Clark County jail at Helena, Montana, for the term of twenty days, and that you pay a fine of Two Hundred and Fifty Dollars, and be confined in said county jail until said fine is paid, or you are legally discharged according to law.

Judgment rendered and entered March 21st, A. D. 1908.

[Seal] GEO. W. SPROULE,
Clerk.

Attest a true copy of Judgment:

[Seal] GEO. W. SPROULE,
Clerk.
By C. R. Garlow,
Deputy Clerk.

Clerk's Certificate to Judgment-Roll.

United States of America,
District of Montana,—ss.

I, George W. Sproule, Clerk of the United States District Court, for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Witness my hand and the seal of said court at Helena, Montana, this 21st day of March, A. D. 1908.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1253. Title of Court and Cause. Judgment-roll. Filed and Entered, Mar. 21, 1908. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 26th day of March, 1908, defendant filed his Bill of Exceptions herein, which was settled and allowed and ordered filed nunc pro tunc as of March 21st, 1908, said Bill of Exceptions and Order allowing same being the words and figures following, to wit:

In the District Court of the United States for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMIL BIRCHER,
Defendant.

Bill of Exceptions.

Be it remembered that heretofore, to wit, on the 18th day of March, A. D. 1908, being a day of the November Term, 1907, of said Distirct Court, the above-entitled cause came on regularly for trial before the United States District Court for the District of Montana, the Honorable William H. Hunt, the judge thereof, presiding, Carl Rasch, Esq., United States Attorney appearing as attorney for the plaintiff, and Messrs. Walsh & Nolan, and G. W. Myers, Esq., appearing as attorneys for the defendant. A jury of twelve persons was duly and regularly empaneled to try said cause. Whereupon the following proceedings were had, to wit:

Before the introduction of any evidence in said cause, the defendant herein, by his attorneys, objected to the introduction of any evidence herein on the ground that the indictment herein did not state

facts sufficient to constitute a public offense, which said objection was by the Court overruled to which ruling of the Court defendant, by his counsel, then and there duly excepted, which said exception was then and there duly noted.

That thereupon the plaintiff introduced evidence in support of the charges contained in said indictment and evidence was by the defendant thereafter introduced in opposition thereto, and thereafter the jury returned their verdict wherein and whereby they found the defendant guilty in the manner and form charged in said indictment. That thereupon the Court fixed the time for sentence for March 21st, 1908.

Be it further remembered that, on the 21st day of March, 1908, being a day of the November Term of said Court, and the time fixed for sentence and before judgment was rendered or sentence passed in said cause, the defendant moved the Court in arrest of judgment, which said motion was in words and figures as follows:

(Title of Court and Cause as above.)

"Comes now the defendant above named and moves the Court that judgment herein be arrested and the passing of sentence be stayed, and that the indictment herein be dismissed and that the defendant go hence without day, for that the said indictment does not state facts sufficient to constitute a public offense.

WALSH & NOLAN and
G. W. MYERS,
Attorneys for Defendant."

Which said motion was by the Court overruled and denied and the Court proceeded to render judgment and passed sentence on the defendant, to which ruling of the Court in overruling said motion in arrest of judgment and in rendering judgment and passing sentence in said cause, the defendant, by his counsel, then and there duly excepted and said exception was then and there duly noted.

And now, therefore, in furtherance of justice and that right may be done, the defendant presents the foregoing as and for his Bill of Exceptions in this cause, and prays that the same may be settled and allowed and signed and certified by the judge of the above-entitled Court who tried said cause, as provided by law.

G. W. MYERS and
WALSH & NOLAN,
Attorneys for Defendants.

In the United States District Court for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMIL BIRCHER,
Defendant.

Order Settling and Allowing Bill of Exceptions.

This ca*se* coming on regularly before the Court on this 26th day of March, 1908, being a day of the November Term, 1907, of said District Court, upon the application of the defendant for the settling and

allowance of his proposed bill of exceptions herein, heretofore duly and regularly served and presented for settlement within the time allowed by law and the rules of court, and the plaintiff, by its attorney, having waived in open court its right to propose amendments thereto, and having consented that the same may be now settled and allowed,—

It is now ordered that the foregoing Bill of Exceptions be and it is hereby settled and allowed as a true Bill of Exceptions in this cause, and the same is now hereby certified accordingly by the undersigned, the presiding judge of said court, who tried said cause, and it is ordered that the same be filed nunc pro tunc as of March 21st, 1908, and made a part of the record herein.

WILLIAM H. HUNT,
United States District Judge.

Admission of Service of Bill of Exceptions, etc.

Due personal service of within Bill of Exceptions made and admitted and receipt of copy acknowledged this 25th day of March, 1908, and it is hereby stipulated that said Bill of Exceptions is true and correct, and that the same may be signed and settled as defendant's Bill of Exceptions to the rulings in said bill referred to.

CARL RASCH,
United States Attorney and Attorney of Record for Plaintiff.

[Endorsed]: Title of Court and Cause. Bill of Exceptions. Entered and Filed Nunc Pro Tunc as of March 21st, 1908. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of March, 1908, the defendant filed his Assignment of Errors herein, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL BIRCHER,

Defendant.

Assignment of Errors.

Comes now Emil Bircher, the defendant in the above-entitled cause, and files the following assignment of errors upon which he will rely upon the prosecution of a writ of error to have reviewed a judgment made and entered in said cause by the above-entitled District Court, on the 21st day of March, A. D. 1908, wherein and whereby the said Court sentenced the said defendant to imprisonment in the county jail of Lewis and Clark County, Montana, for the period of twenty days, and for the payment of a fine of $250.00, and assigns that in the records and proceedings in the above-entitled cause, there is manifest error in this, to wit:

I.

That the Court erred in holding that the indictment herein states facts sufficient to constitute a public offense.

II.

That the Court erred in overruling defendant's objection to the introduction of any evidence in said cause, on the ground that said indictment did not state facts sufficient to constitute a public offense.

III.

That the Court erred in overruling defendant's motion in arrest of judgment, on the ground that said indictment did not state facts sufficient to constitute a public offense.

IV.

That the Court erred in holding that the indictment herein sufficiently charged a violation of the act of the Congress of the United States of February 25, 1885, entitled "An Act to prevent unlawful occupancy of the Public Lands," in charging that, at the time the defendant, as alleged, was maintaining and controlling the fence and enclosure in said indictment referred to he had no claim or color of title made or acquired in good faith, with a view to entry thereof, at the proper land office under the general laws of the United States to the lands referred to in said indictment, without charging that the person, party, association or corporation making or controlling said enclosure had no claim or color of title, as aforesaid, at the time such enclosure was made.

Wherefore, the defendant prays that the judgment of said Court be reversed.

G. W. MYERS and
WALSH & NOLAN,
Attorneys for Defendants.

[Endorsed]: Title of Court and Cause. Assignment of Errors. Filed March 21st, 1908. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of March, 1908, the defendant filed his Petition for Writ of Error herein, said petition being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL BIRCHER,

Defendant.

Petition for Writ of Error.

Emil Bircher, the defendant in the above-entitled cause, feeling himself aggrieved by the judgment made and entered in said District Court in said cause on the 21st day of March, A. D. 1908, and complaining that in the record and proceedings had in said cause, and also in the rendition of said judgment, manifest error hath happened to the great damage of said defendant, comes now and petitions the above-entitled court for an order allowing said defendant to prosecute a writ of error to the United States Circuit Court of Appeals, in and for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided, and also that an order may be made fixing the amount of security which said defendant shall give and furnish upon

said writ of error, and that upon the giving of such security all further proceedings in this court shall be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals, and for such other and further order as to the Court may seem just.

G. W. MYERS and
WALSH & NOLAN,
Attorneys for Defendant.

Helena, Montana, March 21st, 1908.

[Endorsed]: Title of Court and Cause. Petition for Writ of Error. Filed March 21st, 1908. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of March, 1908, an Order Allowing Writ of Error was made and entered herein, said Order being in the words and figures following, to wit:

In the District Court of the United States, in and for the District of Montana.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMIL BIRCHER,
Defendant.

Order Allowing Writ of Error, etc.

At a stated term, to wit, the November Term, A. D. 1907, of the District Court of the United States, in and for the District of Montana, held at the city of

Helena, in the District and State of Montana, on the 21st day of March, A. D. 1908.

Present, the Honorable WILLIAM H. HUNT, District Judge.

Upon motion of Messrs. Walsh & Nolan, attorneys for defendant, and upon filing a petition for writ of error and assignment of errors, it is ordered that a writ of error be and hereby is allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofoe entered herein, on the 21st day of March, A. D. 1908, and that the amount of bond on said writ of error be and hereby is fixed at fifteen hundred ($1500.00) dollars, and that upon said defendant Emil Bircher, plaintiff in error, filing with the clerk of this court a good and sufficient bond in said sum of fifteen hundred ($1500.00) dollars, approved by this court or its judge, execution on said judgment be stayed and all further proceedings in this court be and they hereby are suspended and stayed until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 21st day of March, 1908.

WILLIAM H. HUNT,

United States District Judge for the District of Montana.

[Endorsed]: Title of Court and Cause. Order Allowing Writ of Error. Filed and Entered March 21st, 1908. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of March, 1908, the defendant filed his Bond on Writ of Error herein, said Bond being in the words and figures following, to wit:

In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL BIRCHER,

Defendant.

Bond on Writ of Error.

Know all men by these presents, that Emil Bircher, as principal, and The United States Fidelity and Guaranty Company, a corporation, as surety, are held and firmly bound unto The United States of America, above named, in the sum of fifteen hundred ($1500.00) dollars, to be paid to said United States of America, for the payment of which well and truly to be made the said principal and surety bind themselves, their executors, administrators, successors and assigns, jointly and severally, firmly by these *pe*sents.

Duly executed and dated this 21st day of March, A. D. 1908.

The condition of the foregoing obligation is such that whereas the above-bounden defendant, Emil Bircher, has sued out or is about to sue out a writ of error to the United States Circuit Court of Appeals

in and for the Ninth Circuit to reverse the judgment in the above-entitled cause by said District Court.

Now, therefore, the condition of the above obligation is such that if the said Emil Bircher, defendant in said cause and plaintiff in error, shall appear either in person or by attorney in the United States Circuit Court of Appeals for the Ninth Circuit on such day or days as may be appointed for the hearing of said cause, and prosecute his said writ of error to effect, and, if he fail to make his plea good, shall answer all damages and costs, and shall abide by and obey all orders made by said Circuit Court of Appeals in said cause, and shall surrender himself in execution of the judgment and sentence sought to be reviewed, as said Circuit Court of Appeals may direct, if the judgment and sentence against him shall be affirmed, then the above obligation to be void, otherwise in full force and effect.

EMIL BIRCHER.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

[Corporate Seal] By EDWARD C. MURRAY,
Its Attorney-in-fact.

The foregoing bond is approved as to form and sufficiency this 21st day of March, A. D. 1908.

WM. H. HUNT,
United States District Judge for the District of Montana.

[Endorsed]: Title of Court and Cause. Bond. Filed Mar. 21, 1908. Geo. W. Sproule, Clerk.

And thereafter, to wit, on the 21st day of March, 1908, a Writ of Error was duly issued herein, which is hereto annexed, being in the words and figures following, to wit:

In the Circuit Court of the United States, Ninth Circuit in and for the District of Montana.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

EMIL BIRCHER,

Defendant.

Writ of Error (Original).

United States of America,—ss.

The President of the United States to the Honorable the District Court of the United States for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before you, between The United States of America, defendant in error and plaintiff in the court below, and Emil Bircher, plaintiff in error and defendant in said District Court, manifest error hath happened to the great damage of said defendant and plaintiff in error Emil Bircher, as by his petition and assignment of errors appears, we being willing that error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then

under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of *Francisco*, in the State of California, within thirty days from the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right, and according to the laws and customs of the United States, should be done.

Witness, The Honorable MELVILLE W. FULLER, Chief Justice of the United States, and the seal of the Circuit Court of the United States, for the District of Montana, this 21st day of March, 1908.

[Seal] GEO. W. SPROULE,
Clerk U. S. Circuit Court, Ninth Circuit, District of Montana.

Due personal service of the foregoing writ of error made and admitted and receipt of copy acknowledged this 21st day of March, 1908.

CARL RASCH,
U. S. Attorney, in and for the District of Montana.

Return to Writ of Error.

The Answer of the Judge of the District Court of the United States for the District of Montana.

The record and all proceedings of the plaintiff in error, wherein mention is within made, with all things touching the same, I hereby certify, under the seal

of said court, to the United States Circuit Court of Appeals for the Ninth Circuit within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1253. In U. S. Circuit Court, Ninth Circuit, District of Montana. United States of America, Plaintiff, vs. Emil Bircher, Defendant. Writ of Error. Filed March 21st, 1908. Geo. W. Sproule, Clerk. Walsh & Nolan, Helena, Mont., and G. W. Myers, Attorneys for Defendant.

And thereafter, to wit, on the 21st day of March, 1908, a Citation was duly issued herein, which is hereto annexed, being in the words and figures following, to wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

EMIL BIRCHER,
Defendant.

Citation on Writ of Error (Original).

United States of America,—ss.

To the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the city of San Francisco, State of California, thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Montana, wherein Emil Bircher is plaintiff in error and you, the said United States of America, are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness, the Honorable WILLIAM H. HUNT, United States District Judge for the District of Montana, this 21st day of March, A. D. 1908.

WM. H. HUNT,
United States District Judge for the District of Montana.

Due personal service of the foregoing citation made and admitted and receipt of copy acknowledged this 21st day of March, 1908.

CARL RASCH,
United States District Attorney and Attorney for Plaintiff.

[Endorsed]: No. 1253. In the District Court of the United States, District of Montana. United

States of America, Plaintiff, vs. Emil Bircher, Defendant. Citation. Filed March 21st, 1908. Geo. W. Sproule, Clerk. Walsh & Nolan, Helena, Mont., and G. W. Myers, Attorneys for Defendant.

Clerk's Certificate to Transcript of Record.

United States of America,
District of Montana,—ss.

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, that the foregoing volume, consisting of 32 pages, numbered consecutively from 1 to 32, is a true and correct transcript of the pleadings, process, orders, judgment-roll, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said court in my possession; and I do further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause with admission of service thereof.

I further certify that the costs of the transcript of record amount to the sum of seventeen 25/100 dollars ($17.25), and have been paid by the plaintiff in error.

In witness whereof, I have hereunto set my hand and affixed the seal of said United States District

Court for the District of Montana, at Helena, Montana, this 27th day of March, A. D. 1908.

[Seal] GEO. W. SPROULE,
Clerk.

[Endorsed]: No. 1593. United States Circuit Court of Appeals for the Ninth Circuit. Emil Bircher, Plaintiff in Error, vs. The United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court for the District of Montana.

Filed April 10, 1908.

F. D. MONCKTON,
Clerk.

No. 1593.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMIL BIRCHER,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

GEO. W. MYERS,
WALSH & NOLAN,
Attorneys for Plaintiff in Error.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMIL BIRCHER,

Plaintiff in Error.

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

I.

STATEMENT OF CASE.

By an indictment returned in December, 1907, it is alleged that certain described lands, comprising an area of 1920 acres, were on the 17th day of November, 1907, public lands within the state and district of Montana; and that Emil Bircher on that day

> "Did wrongfully and unlawfully, maintain and con-
> "trol, and cause to be maintained and controlled by
> "him, the said Emil Bircher, an inclosure of the said
> "lands consisting of a fence of posts and wires, which
> "said fence, then and there, inclosed all of the said
> "tract of land comprising an area of approximately
> "nineteen hundred and twenty acres of land, said
> "lands so inclosed as aforesaid being public lands of
> "the United States, and he, the said Emil Bircher,

"at the time of so maintaining and controlling said "fence and inclosure as aforesaid, has no claim or color "of title made or acquired in good faith, or an asserted "right to said lands by or under claim made in good "faith, or an asserted right to said lands by or under "claim made in good faith with a view to entry thereof "at the proper land office under the general laws of the "United States to said lands, or any part or parcel "thereof; contrary to the form of the statute in such "case made and provided, and against the peace and "dignity of the United States of America."

Record, page 3.

Upon a plea of not guilty,

Record, page 6,

the issues framed were tried by a jury, which returned a verdict of "guilty in manner and form as charged in the indictment."

Record, page 7.

Thereafter, a motion in arrest of judgment was interposed, upon the ground that the indictment did not state facts sufficient to constitute a public offense.

Record, page 7.

This motion was denied,

Record, page 8,

and a bill of exceptions was duly presented, allowed and filed, preserving the exception to the order of the court denying the motion in arrest of judgment.

Record, pages 12-15.

On the 21st day of March, 1908, judgment was pronounced and entered against Bircher, imposing a fine of $250, and sentencing him to confinement in jail for the term of twenty days.

Record, pages 12-15.

The plaintiff in error filed his assignment of errors,

Record, pages 16-17,

and with it his petition for a writ of error to this court,

Record, pages 18-19,

which was allowed,

Record, pages 19-20,

and a bond given as required in the order,

Record, pages 21-22,

and the case is regularly here on writ of error.

The question involved is whether or not the indictment states facts sufficient to constitute a public offense and that question is raised by the motion in arrest of judment, the bill of exceptions taken to the order denying the motion, and the assignment of errors.

II.

SPECIFICATION OF ERRORS.

The plaintiff in error specifies and relies upon the following error committed by the trial court, to-wit:

The court erred in denying defendant's motion in arrest of judgment.

III.

BRIEF OF ARGUMENT.

The contention of plaintiff in error is that the indictment is fatally defective in that it omits to charge therein an indispensable element clearly prescribed by the statute.

Omitting the parts which are irrelevant, the act of Feb-

ruary 25, 1885, under which the indictment was drawn, declares:

> "Section 1. That all inclosures of any public lands * * * heretofore or to be hereafter made, erected, or constructed by any person, * * * to any of which lands included within the inclosure the person * * * making or controlling the inclosure had no claim or color of title, made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States, at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction or control of any such inclosure is hereby forbidden and prohibited."
>
> "Section 4. That any person violating any of the provisions hereof, * * * shall be deemed guilty of a misdemeanor, and fined in a sum not exceeding one thousand dollars and be imprisoned not exceeding one year for each offense."

It is obvious that to constitute the offense created and defined by this statute, the following elements must coexist:

First.—The land inclosed must be public land of the United States.

Second.—The person erecting or maintaining or controlling the inclosure must have had *"at the time any such inclosure * * * shall be made"* neither claim nor color of title made or acquired in good faith to the land, nor any asserted right thereto, by or under claim made in good faith, with a view to the entry thereof.

The only inclosure which is denounced as unlawful is the inclosure made by a person who *at the time the inclosure was made by him had* neither claim nor asserted right to the public lands included therein.

The words "such inclosure" used in "and the maintenance, erection, construction or control of any such inclosure is hereby forbidden and prohibited" have reference to and embrace only the inclosures defined as unlawful by the preceding part of the section.

To dwell upon this palpable meaning, or to endeavor to show that the words are not susceptible of any other interpretation would simply be needless. It will not do to say that the words "at the time any such inclosure was or shall be made" have reference to and qualify only the words "or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office, under the general laws of the United States." This would be to give the statute a meaning which it does not reveal and cannot bear Such a contention would not only be at war with the plain language of the first paragraph of Section 1, but would also destroy the effect of the emphatic word "had which just precedes any claim or color of title." "Had no claim * * * made in good faith or an asserted right thereto under claim made in good faith, with a view to entry thereof" * * * is limited and qualified by "at the time any such inclosure was or shall be made."

When must a defendant charged with maintaining an unlawful inclosure have had no claim or asserted right? There can be but one answer, and it is that he must have had no claim or asserted right at the time the inclosure was made. The indictment in this case charges the defendant with maintaining and controlling an inclosure

of public lands, "he * * * at the time of so maintaining and controlling said fence and inclosure as aforesaid has no claim or color of title made or acquired in good faith or an asserted right to said lands by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States to said lands."

There is neither statement nor recital that plaintiff in error *at the time the inclosure* was made, was without claim or asserted right. It is no answer to say that Congress must have intended to declare that which it has not declared, or to speculate or surmise as to its intention, or to assert that the spirit of the statute has been violated. A criminal case must be completely within all the words of the statute, and no criminal case can be brought by construction within the statute.

"If a case is fully within the mischief to be remedied, and is even of the same class, and within the same reason as other cases enumerated, still if not within the words, construction will not be permitted to bring it within the statute."

Bishop on Statutory Crime, Sec. 220.

Again:

> "A prisoner may defend himself by showing, if he can, that either the main part of the enactment or some clause put into it to create an exception, is so unguardedly worded as to open an escape for him through the letter, his act being still a complete violation of his spirit."
>
> Ib. 230.

See also Ib. Sections 80, 119, 218, 222, 224, 226, 227, 228, 232 and 340.

In

United States vs. Fox, 95 U. S. on page 672,

the court said:

> "It is quite possible that the framers of the statute intended it to apply only to acts committed in contemplation of bankruptcy; but it does not say so, and we cannot supply any qualifications which the legislature has failed to express."

In

United States vs. Harris, 177 U. S. 305,
44 L. Ed. 780,

the court said:

> "Giving all proper force to the contention of counsel for the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statute, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the class of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of statute,"

and then quoted with approval the following language of Chief Justice Marshall in the case of

United States vs. Wiltberger, 5 Wheat. 76;

> "The rule that penal laws are to be construed strictly is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals, and on the plain principle that the power of punishment is vested in the legisla-

tive, and not in the judicial department. It is the legislature, not the court, which is to define a crime and ordain its punishment. It is said that, notwithstanding this rule, the intention of the lawmaker must govern in the construction of penal as well as other statutes. * * * But this is not a new independent rule which subverts the old. It is a modification of the ancient maxim, and amounts to this, that though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ Where there is no ambiguity in the words there is no room for construction. The case must be a strong one indeed which would justify a court in departing from the plain meaning of words,—especially in a penal act, in search of an intention which the words themselves did not suggest. To determine that a case is within the intention of a statute its language must authorize us to say so. It would be dangerous, indeed, to carry the principle that a case which is within the reason or mischief of a statute is within its provisions, so far as to punish a crime not enumerated in the statute because it is of equal atrocity, or of a kindred character with those which are enumerated. If this principle has ever been recognized in expounding criminal law, it has been in cases of considerable irritation, which it would be unsafe to consider as precedents forming a general rule for other caes."

And the same court, in the case of

United States vs. Gooding, 12 Wheat. 460,
6 L. Ed. 699,

said:

"But it is sufficient to say, that the word 'such' has an appropriate sense, and can be reasonably referred to the ship or vessel previously spoken of; and such ship or vessel is not one merely built, fitted out, etc., but

one built, fitted out, etc. in a port or place within the United States. The whole description must be taken together. If we were to adopt any other construction, we should read the words as if 'such' were struck out, and the clause stood, 'any ship or vessel.' Such a course would not be defensible in construing a penal statute."

Declarations of like character will be found in the following cases:

Res Publica vs. Weidgle, 2 Dallas, 88, 1 L. Ed. 307;
Bolles vs. Outing Co., 175 U. S. 262;
Gardner vs. Collins, 2 Peters, 58-93;
Railway Co. vs. Phelps, 137 U. S. 536;
United States vs. Hartwell, 6 Wall. 395;
Baldwin vs. Franks, 120 U. S. 678;
United States vs. Reece, 92 U. S. 214;
Williamson vs. U. S., 207 U. S. 458.

In the case of

United States vs. Churchill, 101 Fed. 443,

the precise question now presented was determined adversely to the contention of the Government. Judge De Haven in that case said:

"The defendant is charged with unlawfully and knowingly maintaining a certain inclosure of public lands of the United States, in violation of section 1 of the act entitled 'An act to prevent unlawful occupancy of the public lands,' approved February 25, 1885 (23 Stat. 321). The indictment is fatally defective *in not charging at the time the alleged unlawful inclosure was made or erected* the defendant or other person who constructed the same had no claim or color of title to any of the public lands inclosed, 'made or acquired in good faith, or an asserted right thereto by or under claim made in good faith with a view to entry thereof at the proper land office under the general laws of the Untied States.' "

It is asserted, however, that the Government is remediless in cases such as the indictment specifies, unless by construction they are covered by the statute under consideration. This by no means follows. The Government is at liberty to proceed by a suit in equity, or by an action at law, to remove or abate nuisances consisting of inclosures of public lands, to which persons maintaining the inclosures were without color of title or claim at the time they maintained the inclosures.

United States vs. Ranch Co., 25 Fed. 465;
Ib. 26 Fed. 218;
United States vs. Cattle Co., 33 Fed. 323.

We respectfully submit that the acts charged are not within the provisions of the statute under which the indictment is framed, and, as charged, are insufficient to constitute the offense therein specified, and the motion in arrest should have been granted.

The judgment ought to be reversed with directions to sustain the motion and discharge the plaintiff in error.

Respectfully submitted,

GEO. W. MYERS,

WALSH & NOLAN,

Attorneys for Plaintiff in Error.

No. 1593.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMIL BIRCHER,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

JAMES W. FREEMAN,
U. S. Attorney, District of Montana.
S. C. FORD,
Assistant U. S. Attorney.

Timely service of this Brief is hereby admitted, this .... day of February, 1909.

.....

Attorneys for Plaintiff in Error.

No. 1593.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EMIL BIRCHER,

Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

I.

HISTORY OF THE CASE.

The plaintiff in error, who will hereinafter be called "the defendant", was indicted by the Grand Jury of the District Court of the District of Montana on the 20th day of December, 1907. The charging part of the indictment reads as follows:

"Did wrongfully and unlawfully, maintain and control, and cause to be maintained and controlled by him, the said Emil Bircher, an inclosure of the said lands consisting of a fence of posts and wires, which said fence, then and there, inclosed all of the said tract of land comprising an area of approximately nineteen hundred and twenty acres of land, said lands so inclosed as aforesaid being public lands of the United States, and he the said Emil Bircher,

at the time of so maintaining and controlling said fence and inclosure as aforesaid, had no claim or color of title made or acquired in good faith, or an asserted right to said lands by or under claim made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States to said lands, or any part or parcel * * *"

Transcript of Record, Page 3.

On January 25th, A. D. 1908, the defendant entered his plea of not guilty to the indictment.

Transcript of Record, page 6.

Thereafter, issues thus framed were tried by jury, and on the 20th day of March, A. D. 1908, said jury returned a verdict of guilty of the crime charged in the indictment.

Transcript of Record, page 7.

Thereafter on the 21st day of March, 1908, and before Judgment, defendant moved in arrest of Judgment upon the ground that the indictment did not state facts sufficient to constitute a public offense.

Transcript of Record, page 7.

This motion was denied March 21st, 1908.

Transcript of Record, page 8.

On the 26th day of March, 1908, defendant filed a Bill of Exceptions to the order of the Court denying the motion in arrest of judgment, which was allowed and filed.

Transcript of Record, pages 12-15.

On March 21st, 1908, judgment was pronounced and en-

tered against the defendant, imposing a fine of $250.00, and sentencing him to confinement in the Lewis & Clark County Jail for a term of twenty days.

Transcript of Record, pages 9-11.

Thereafter, on the 21st day of March, 1908, defendant filed his assignment of error.

Transcript of Record, pages 16-17.

And with the assignment of error filed his petition for a writ of error to this Court, (Transcript of Record, pages 18-19), which was allowed, (Transcript of Record, pages 19-20), and a bond given as required in the order, (Transcript of Record, pages 21-22).

The allegations or assignment of error, and points raised by counsel for defendant will be considered.

ARGUMENT.

THE MOTION IN ARREST OF JUDGMENT WAS PROPERLY OVERRULED.

This Indictment was found under the Act of February 25th, 1885, which is as follows:

"Section 1. That all inclosures of any public lands in any State or Territory of the United States, heretofore or thereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure

had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any state or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosures, is likewise declared unlawful, and hereby prohibited."

"Section 4. That any person violating any of the provisions hereof, whether as owner, part owner, agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding one thousand dollars and be imprisoned not exceeding one year for each offense."

Judge Hunt, in his opinion overruling the Motion in arrest of Judgment, in the Court below, said:

"The general views of the statute must have prevailed because of the language which has suggested them, and because the intention of Congress in using the words it did throughout the Act and in the title was obviously to prevent occupancy of the public domain. It may be that there has been no case which turned for decision solely upon the precise point presented by the motion filed in

this case; but we find several opinions by Judges as to what the Act in effect declares, from which it is reasonable to infer that close study and construction of the latter, as well as the spirit of the Act, must have been had as predicates for the opinions delivered."

And again,

"But the law goes farther, and in order to make the underlying purpose of the statute as effective as possible, in the policy of prohibiting any inclosure of any public lands, except by those who contemplate entry, it also forbids maintaining any inclosure by one who has no claim with a view to entry, at the time the inclosure is to be kept. Such as the inclosure forbidden to be kept, and such is the kind included within the terms and obvious intent of the law. That is to say, the words 'such inclosure,' as used in the second clause of section one, refer to an inclosure of public lands, to any of which land included within the inclosure the maintainer has no claim of title when he is keeping up the inclosure. They are to be read with relation to the word 'maintenance', signifying continuing acts. The words in the first clause specifying the time when, if maker of the inclosure had no title, he is liable under the law qualify the definitions of the offense of the making of the inclosure, and are to be construed with relation to the verb 'made', which in turn but means passed action which has caused the inclosure to exist. If the language had meant that those only who had no claim when the inclosure was made, or the fence was constructed, were liable as maintainers, Congress could easily and perfectly

clearly have restricted the meaning of the word 'maintenance' by inserting the words 'or maintained' after the verb 'made' in the first clause, so that the words of prohibition would have read, 'all inclosures of public lands heretofore or to be hereafter made, maintained, erected etc.' But they do not, and we must assume that the legislation was deliberately had. The distinct use of the noun 'maintenance' in the second clause leads, therefore, to the belief that a different but continuing offense was defined. From this, it should naturally follow that the inclosure described as one maintained must be regarded by relation to what constitutes maintenance as forbidden, independently of the intent to enter the land at the time when the inclosure was made."

"The whole statute is one framed with a view to stop the occupation of the public lands, and to meet every situation that, it would seem, could possibly arise to annoy or harrass or impede the bona fide homeseeker or claimant under the land law".

To protect the public lands in every possible emergency Congress, by section five of this Act provides the following:

"That the President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ such civil or military force as may be necessary for that purpose."

In execution of this authority, President Cleveland, on

August 7th, 1885, issued a proclamation with the following preamble:

"Whereas, public policy demands that the public domain shall be reserved for the occupancy of actual settlers in good faith, and that our people who seek homes upon such domain shall in no wise be prevented by any wrongful interference from the safe and free entry thereon to which they may be entitled."

The substance of the proclamation may be stated in these words: " * * * which declared to be unlawful all inclosures of any public lands in any State or Territory, to any of which land included within said inclosure the person making or controlling such inclosure, had no claim or color of title made or acquired in good faith, or any asserted right thereto * * * with a view to entry thereof at the proper land office; Do hereby order and direct that any and every unlawful inclosure of the public lands * * * be immediately removed."

In Camfield vs. United States, 66 Fed. on pp. 103 and 104, the Circuit Court of Appeals, speaking through Judge Thayer said:

"Section 1, of the Act of February 25, 1885, supra, declared, *in effect,* that it should thereafter be deemed unlawful for any person, association, or corporation to make or maintain an inclosure which embraced within its limits any public land of the United States, to which the person making *or maintaining* the inclosure had no claim or color of title, and to which he asserted no right under a claim

made in good faith, with a view to entry thereof at the proper land office."

In Krause vs. U. S., 147 Fed. on p. 445, the same Circuit Court of Appeals, speaking through Judge Phillips, held that an indictment charging the maintaining of an inclosure of public lands, the person, "so maintaining and controlling said fence and inclosure as aforesaid, *then and there* having no claim or color of title to any of said land" * * * "Clearly enough charges the offense of maintaining and controlling an inclosure of public lands within *the prohibition of the statute.*"

In Carroll vs. U. S., 154 Fed. 425, the defendant was chagred in the second count, in the identical language of the indictment in the case at bar, with the *maintaining* an unlawful enclosure of public lands, and was convicted upon that count, the Circuit Court of Appeals of this Circuit affirmed the judgment, saying:

"But it must be apparent that the plaintiff in error might be guilty of erecting an unlawful enclosure of public lands as charged in the first count, and yet might not be guilty of maintaining it, and it is equally clear that he might not be guilty of erecting an inclosure and yet be chargeable with maintaining and controlling it." p. 428.

A case in point upon the first proposition suggested by the Court of Appeals is U. S. v. Elliott, 74 Fed. 92, in which the erection and construction of the enclosure was illegal and within the prohibition of the statute, but *the maintenance* of the same enclosure was not. Such a situation would be impossible if the defendant's counsel's con-

tention as to the proper construction of the statute were correct, because under the construction contended for by them, the conditions *existing at the time of the erection of the fence* would govern the case.

II.

Should these decisions, deliberately made by learned courts, be ignored and overruled on the mere suggestion that the identical question presented here was not raised there? It certainly will and must be assumed that the courts referred to were cognizant of the terms of the statute, familiar with its provisions, and fully understood their import, meaning, and effect. A careful examination of the law will show that the rulings made by these courts are entirely consistent with its provisions, and that no other construction would have been justified.

The first part or clause of Section 1 of the Act provides that:

"All inclosures of public land, made, *erected* or *constructed,* to any of which land the person making or controlling the inclosure had no claim or color of title, at the time any such inclosure was or shall be MADE, are hereby declared unlawful."

The thing denounced is the *making,* erecting or constructing of the enclosure. These various terms were evidently not used as synonymous or identical in meaning. Clearly, however, the *making,* the *erecting,* and the *con-*

structing of an enclosure, or either, is declared to be unlawful.

The statute then proceeds as follows:

"And the *maintenance,* erection, construction or control of any such enclosure is hereby forbidden and prohibited."

It will be perceived that the terms *erection* and *construction* are repeated in the second clause, but the term *"make"* is not. The term "maintenance" is used instead. But, as was said in Moorhead vs. Railroad Company, 17 Ohio, 340, 353:

"To build or construct a railroad is one thing, to *maintain* the structure after it is erected or built is another."

And, again, as stated in Smith v. Grayson County, 18 Tex. Civ. App. 153; 44 S. W., 921, 923:

"Maintenance", is used in Const. Art. 8, Sec. 9, providing that the Legislature may pass local laws for the maintenance of public roads, is not limited in its meaning to the repair and RECONSTRUCTION of roads already constructed, but has reference to maintaining a system of public roads and highways, and would authorize the passage of a statute creating a road system, or of any laws necessary to provide and keep up a system of highways. *The term includes the establishment of a highway."*

So, likewise, in Rhodes vs. Mummery, 48 Ind. 216, it was held that a statute providing that partition fences "shall be *maintained* throughout the year," equally by both parties: "is not limited to repairs simply, but applies as well to the *rebuilding of a fence* destroyed by fire."

The term "maintain" or "maintenance", is not a term

of fixed or inflexible meaning, but its import and significance depends upon the subject matter in connection with which it is used. This will become at once apparent in examining the different meanings given to the term in the great variety of cases collated in 19 Ency. of Law (2nd Ed.) on pp. 609-612. As has been seen the term "made", used in the first clause of the statute, is not again used in the second clause of the Act, but the terms "maintenance" is used in the place of it, whereas the term "erect and construct", also used in the first clause, are repeated in the second. The *erecting* or *constructing* of a fence signify and import the process and manner and means of the making of an inclosure, but the inclosure is not "MADE" until completed. To inclose means "to surround, to shut in, to confine on all sides", 22 Cyc. p. 62, and an inclosure of land, is a tract of land shut in and confined on all sides. It is a thing finished and complete, and, quoting the language of the statute, "the time any such inclosure was or shall be *made*" is the time when the inclosure is a complete thing and an accomplished fact. As was said in Savings & Loan Co. vs. Miller (Tenn.) 47 S. W. 17, 24, the term "'Made' contemplates the completion of the contract, so that it is not made while anything yet remains to be done to give it legal efficacy."

Of course, it is plain that, in as much as the terms "erection and construction" are used in the second clause as well as in the first, but the term "make" or "making" is deliberately eliminated, and the term "maintenance" substituted, such change of phraseology was not accidental.

As already pointed out the term "maintain" or "maintenance" has been and should be interpreted according to the subject matter in connection with which it is used. To maintain a railroad, for instance, either in making repairs, or in reconstructing a part thereof, which may have been destroyed, is not the "making" of the railroad, nor is the maintenance of a house or building by repairing or replacing a part thereof, a "making" of the house or building. The maintenance by repairing of a ditch, out of repair to such an extent that it cannot be successfully used is not the "making" of the ditch, nor is the maintenance of a fence, the *making of the enclosure.* The inclosure ceases to be an inclosure, just as soon as a part of the barrier or obstruction surrounding the tract of land, is broken down, removed, or gets out of repair to such an extent that it fails to prevent access to the land within. So that, as an inclosure ceases to exist whenever the fences constituting the inclosure fail to serve the purpose for which they were originally erected and constructed, that is to say, "to shut in" and "to confine on all sides", the repairing or replacing of such fences to accomplish that fact is a *making of an enclosure.* Hence, in the light of the cases and authorities cited, to the effect that the term "maintenance" means to repair and to reconstruct, the conclusion is unavoidable that the term "maintenance" as used in the second clause of the Act to the exclusion of the term "make" found in the first, implies and includes the term "making", and for that reason was omitted from the second clause of Section 1 of the Act in question.

III.

We have shown the construction of the Act as actually made by the Appellate Courts, and we have likewise shown that such construction is entirely consistent with the language of the statute in question. It seems to us that, from what has been said, there is nothing left upon which to support counsel's contention with respect to the proper construction of the Act. But let us assume, for the purpose of argument, that all doubt has not been dispelled, what other sources of inquiry are left open to us to determine the meaning of the language used? The Supreme Court of the United States in U. S. vs. Fisher, 2 Crouch on p. 386, gives the answer and points the way, as follows:

> "Where the intent is plain, nothing is left to construction. Where the mind labors to discover the design of the legislature, *it seizes* everything from which aid can be derived; and in such case the *title* claims a degree of notice, and will have its due share of consideration."

And so the rule has been crystallized into this form:

> "In construing a statute, every part is to be considered, including the titles."
>
> Rose's Notes to U. S. vs. Fisher, and cases cited.

The title to the Act in question in this case is:

> "An Act to prevent unlawful occupancy of public lands."

Now, the Government, in the language of Judge Brewer in U. S. v. Cleveland and Colorado Cattle Co., 33 Fed., on p. 330,

"has not simply the right of a property owner in respect to these lands; it has all the powers of sovereignty."

And as said by the same learned Judge in U. S. v. Brighton Ranch Co., 26 Fed. on p. 219:

"Any encroachment upon the public domain," is an unlawful invasion of the Government's rights and may be restrained and ended by appropriate action.

To prevent such encroachments upon the public domain was the avowed purpose of the Act of February 25, 1885, and that the maintenance of an enclosure of such lands to which the person maintaining such enclosure had, at the time of maintaining the same, no claim or color of title is, as said by the Circuit Court of Appeals of the Eighth Circuit in the Krause case:

"Clearly enough within the prohibition of the statute."

If the conditions existing at the time of the original construction of the fences were exclusive and de tennin tive then, as already pointed out, no such situation as had developed in U. S. v. Elliott, supra, decided by Judge Marshall, would avail as a defense. But the startling and absurd result of such a construction would still more glaringly appear in a case where, for instance, a large number of persons should file on 320 acres each under the desert land law, and after making the initial payment of twenty-five cents per acre, proceed to surround the entire tract with a fence. The requirements of the law as to building ditches and reclamation, are, however, not complied with at all. The first annual proof is not made, nor is any

proof made at any time in compliance with the law. Six years have elapsed and the enclosure remains. It is and at all times has been maintained. At the time of the construction of the enclosure the parties making it had color of title, and there was, therefore, no violation of the law with respect to the construction of the fence. The fence has been maintained for five years without a shadow of right or color of title, and yet the Government would be powerless in the premises, because at the time of the construction of the enclosure the parties had color of title to the land enclosed.

But the learned counsel for the defendant assert, that the proper procedure in such a case would be a civil action to recover possession of the land. Are we to infer that Congress did not consider these questions? Certainly not, this act was passed with a full knowledge of all civil remedies existing in favor of the United States, and was intended as a more effective way to clear the public domain.

We submit that a construction leading to such an absurdity carries with it its own conedmnation. As was said by the Supreme Court in Bates v. Bank, 100 U. S. 239:

"Any construction should be disregarded which leads to absurd consequences."

Or, as stated by Judge Cooley in his notes, 1 Blackstone p. 60:

> "The principle is, that we are not to suppose the legislature intended absurd consequences, and must therefore seek in their language for an intent which is reasonable."

"The language used", says Blackstone, "is always to be

"understood as having regard to the 'subject-matter,' and, "as to the effects and consequence, the rule is, that where "words bear either none, or a very absurd signification, if "literally understood, we must a little deviate from the re- "ceived sense of them.

"But lastly, the most universal and effectual way of dis- "covering the true meaning of the law, when the words are "dubious, is by considering the reason and spirit of it, or "the cause which moved the legislature to enact it."

1 Blackstone, pp. 60-61,

And what that is in this case, is clearly and distinctly enunciated in the title of the Act, viz:

"To prevent unlawful occupancy of public lands."

IV.

The learned counsel for the defendant assert that "a criminal case must be completely within all the words of the statute, and no criminal case can ever justly be brought within a statute, although it may be declared to be within a statute by fair *interpretation* of the *words;* 'if a case is fully within the mischief to be remedied, and is ever of the same class and within the words, construction will not be permitted to bring it within the same statute."

The learned Judge, in the Court below, said:

"Conceding, of course, the rule to be that penal laws are to be strictly construed, for such, in effect, is the doctrine defendant invokes, it is none the less true that in construing penal as well as other statutes the intention of the legislative power is to govern; and where the intention

can be gathered from the words used, no construction should prevail which will disregard the plain intent of the lawmakers. Said Chief Justice Marshall in United States v. Wilberger, 5 Wheaton, 76, in speaking of the maxim that penal laws are to be strictly construed: 'The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words in their ordinary acceptance, or in that sense in which the legislature has obviously used them, would comprehend.'"

In the United States v. Leacher, 134 U. S. 645, the Supreme Court speaking through Mr. Chief Justice Fuller, said:

"As construed on behalf of the defendant, there can be no comprehensive offenses, and before a man can be punished, his case must be plainly and unmistakably within the statute. But though penal laws are to be construed strictly, *yet the intention of the Legislature must govern in the construction* of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the Legislature."

Also in

United States v. Winn, 3 Sumn. 209, 211, quoted in U. S. v. Leacher, supra, Mr. Justice Story, said:

"It appears to me, that the proper course, in all these cases, is to search out and follow the true intent of the Legislature, and adopt that sense of the words which harmonize best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislautre."

To the same effect is the statement of Mr. Sedgwick, in his work on Statutory and Constitutional Law, (2d, ed), 282, quoted in U. S. v. Leacher, supra:

"The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or either it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the Courts refusing on the one hand, to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing, by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parts plainly within their scope."

In United States v. Morris 39 U. S. 464, on page 475, Mr. Chief Justice Taney, speaking for the Court said:

"In expounding a penal statute the Court certainly will not extend it beyond the plain meaning of its words; for it has been long and well settled that such statutes must be construed strictly. *Yet the evident intention of the legislature ought not to be defeated by a forced and overstrict* construction."

And in American Fur Company v. United States, 2 Peters, 358, the Court said:

"Even penal laws, which it is said should be strictly construed, *ought not to be construed so strictly as to defeat the obvious intention of the legislature.*"

So in United States v. Winn, Fed. Cases 16, 740, the Court said:

"In short, it appears to me that the proper course in all these cases is to search out and follow the true intent of the legislature, and to adopt that sense of the words, which harmonizes best with the context, and promote in the fullest manner the apparent policy and objects of the legislature. * * * 'We are undoubtedly bound to construe penal statutes strictly, and not to extend them beyond their obvious meaning by strained inferences. On the other hand, we are bound to interpret them according to the manifest import of the words, and to hold all cases which are within the words, and the mischiefs, to be within the remedial influence of the statute. The most restricted sense, then, is not, as a matter of course, to be adopted as the true sense of the statute, unless it best harmonizes with the context, and stands best with the words and with the mischiefs to be remedied by the enactment."

The case of the United States v. Churchill, 101 Fed. Rep. 443, cited by defendant, cannot stand against the cases cited in support of the opposite view.

In many instances the cases cited by the learned counsel for the defendant are in support of our contention, that is, that penal statutes are to be strictly construed, but not be such an extent as to deprive them of the purpose intended by Congress.

It is apparent, from the language used in the Act, that it was the intention of Congress to stop the occupancy of

the public lands, and to meet every situation that, it would seem, could possibly arise to annoy and harrass or impede the bona fide homeseeker of claimant under the land laws.

For the reasons herein set forth, the Motion in Arrest of Judgment was properly overruled.

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